

BOARD OF ZONING APPEAL FOR THE
CITY OF CAMBRIDGE GENERAL HEARING

JUNE 9, 2011 7:00 P.M.

in

Senior Center

806 Massachusetts Avenue

Cambridge, Massachusetts 02139

Brendan Sullivan, Chairman

Constantine Alexander, Vice Chair

Timothy Hughes, Member

Tad Heuer, Member

Thomas Scott, Member

Douglas Myers, Member

Sean O'Grady, Zoning Specialist

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P R O C E E D I N G S

(7:00 p.m.)

(Sitting Members: Brendan Sullivan, Constantine Alexander, Timothy Hughes, Tad Heuer, Thomas Scott.)

BRENDAN SULLIVAN: The Board of Zoning Appeal meeting for June 9, 2011, is now in session. The Board will hear case 10075.

Ms. McCabe, if you would introduce yourself for the record, please.

ATTORNEY KATHLEEN McCABE: Yes. My name is Kathleen McCabe. 129 Mount Auburn Street, Cambridge, Mass. And with me tonight is my client Annette Niwieszewski. And I will refer to her as the owner, although as the file will indicate, the owner is a trust.

Also with me tonight is attorney Douglas Henry who is here to answer any questions you have about the legal history of the case. And also Adolfo Perez is the

architect of record.

CONSTANTINE ALEXANDER:

Mr. Chairman, before we proceed, I'd like to state for the record that many years ago Mr. Henry was employed by the law firm of which I am formerly a partner. That was many years ago, and I don't feel that -- and I did not work with Doug at any length at the firm because he was in a different department than I was. But I don't think that relationship will interfere with my ability to render an impartial decision. But if other Members of the Board or Petitioners feel otherwise, I'll recuse myself from the case.

BRENDAN SULLIVAN: Okay. Do any Members of the Board find a conflict? None.

Does the Petitioner have any concern at all regarding that?

ATTORNEY KATHLEEN McCABE: No.

BRENDAN SULLIVAN: Then I would rule that the members are in standing and we may

proceed.

ATTORNEY KATHLEEN McCABE: The Petition is for Variances from the height restriction for two elements of the property. The first is the widow's walk and the railing to it. And the second is the portion of the addition containing the head house which provides access to the widow's walk. The height requirement restriction is 35 feet. The height of the pre-existing structure was 43 feet, and that's a correction to the materials that you have. The widow's walk and the rail have a finished height of 46 feet. The portion of the addition with the head house has a finished height of 35 feet, eight inches. These two elements were constructed in 1998 pursuant to building permits. Subsequently the City has determined that both violate the height restrictions.

My clients purchased the property in

2000, knowing about the violations but hoping to resolve them.

A literal enforcement of the Ordinance would result in substantial hardship to the owners. The removal of the two eliminates would be expensive. It would eliminate the access to the roof for repair, and it would be the loss of a prominent architectural feature which is typical of this style of the house.

The hardship is due and owing to the shape of the house and the shape and topography of the land affecting this house and not generally affecting the Zoning District in which it is located.

TAD HEUER: What effect does the size and the shape of the lot have to do with it?

ATTORNEY KATHLEEN McCABE: I'm getting to it.

TAD HEUER: Okay.

ATTORNEY KATHLEEN McCABE: I'll answer that question first. If you review the history of this case, there are many various opinions about the grade level and therefore the height of the property.

TAD HEUER: Do any of them suggest that it's under 35 feet?

ATTORNEY KATHLEEN McCABE: I'm sorry?

TAD HEUER: Do any of those analyses suggest the height is under 35 feet?

ATTORNEY KATHLEEN McCABE: I would not be able to recite all the various professionals came up with.

TAD HEUER: Nothing that I saw suggests the house was ever under 35 feet.

ATTORNEY KATHLEEN McCABE: But I think the that the topography and the shape of the land is that the -- first of all, and the house, is the house is an irregular shape and it has many faces, and the land is also

irregular and steeply sloped. So, the various people who have been hired along the way to determine grade and height, including the Commissioner's analysis, have all had various outcomes.

The second factor stemming from the shape of the house is that the original design of the roof was constructed with the flat area in the middle for the purpose of reducing the height. The natural outcome of this design is that you have an access point to repair the roof.

The relief could be granted without substantial detriment to the public good.

It is a minimal increase to the pre-existing height. It is a large lot with the house set back and heavy vegetation. Other houses in the neighborhood have the same design.

The relief can be granted without nullifying or substantially derogating from

the intent of the Ordinance.

The elements in question do not create habitable space, and they are in violation of height restriction only. So, therefore, there's no increase in population or increase in congestion on the streets.

It is a large lot, so that the elements in question do not block air and light for the abutters. And the elements conserve the value and integrity of the property by conserving the architectural feature. And the head house and the rail are built to protect the safety of the occupants.

TAD HEUER: Who's going to be occupying it?

ATTORNEY KATHLEEN McCABE: I'm sorry?

TAD HEUER: Who's going to be occupying it?

ATTORNEY KATHLEEN McCABE: Annette and her family.

TAD HEUER: I mean, the actual widow's walk area. Is that going to be habitable space?

ATTORNEY KATHLEEN McCABE: No.

TAD HEUER: So if it's not going to be habitable space, why do you need a railing. So I'm thinking of a lot of triple deckers in the city, they don't have railings up there just to allow me up to the roof, do they? Actually, I can't imagine that. I can't think of a triple decker quite frankly in the city that has access to its roof that requires a railing.

TIMOTHY HUGHES: How big is the platform? That would make a determination, because on a triple decker you can access the roof for repair and never get within a six feet of the edge. There's still usable walkable space up there. If the platform is only 36 square feet or less, than you would need a rail around it even just to step on it.

ADOLFO PEREZ: It's more than 36 feet.

TAD HEUER: All right, thanks.

TIMOTHY HUGHES: So you have a part of it that you can access without a railing.

ATTORNEY KATHLEEN McCABE:

Mr. Chairman, would the Board like a presentation from Adolfo or would you like to proceed with the questions? He has pictures and visuals.

BRENDAN SULLIVAN: Does anybody have any other questions?

CONSTANTINE ALEXANDER: I have one question. Is the state building code play a role in this with regard to the railing and the widow's walk? Are you required to have that because of --

ADOLFO PEREZ: I think you're required, yes, by code to have it.
(Inaudible).

BRENDAN SULLIVAN: The answer is

yes. The question was yes.

[Tim], do you have any other questions at this point?

TIMOTHY HUGHES: No.

BRENDAN SULLIVAN: Tad, any?

TAD HEUER: No.

BRENDAN SULLIVAN: Anything else you want to present?

ATTORNEY KATHLEEN McCABE: No.

BRENDAN SULLIVAN: Just going back, and again, back in 1998, there was some reconstruction work done on the house. And at that time the widow's walk was reconstructed, rebuilt, and it was to repair or to restore; repair meaning repair the elements, restore it to an original architectural feature. Is that correct?

ADOLFO PEREZ: I wouldn't say repair. There was an access to the roof and there was a flat area. There was no rail at the time.

BRENDAN SULLIVAN: Which is an architectural feature of the house of that period?

ADOLFO PEREZ: Right. The house in front of it has identical widow's walk.

BRENDAN SULLIVAN: Right, okay.

TAD HEUER: But a very different style house.

ADOLFO PEREZ: Yeah, I think it's brick, but the shinwa's (phonetic) is very typical.

BRENDAN SULLIVAN: And at the time the contractor sort of in the repairing, rebuilding enhanced it a bit. Is that a fair characterization again? So that --

ADOLFO PEREZ: Yeah.

BRENDAN SULLIVAN: So that it increased a little bit?

ADOLFO PEREZ: I don't know that the size increased, but there wasn't a rail. So the rail was new. And the head house

was -- there's also a lower deck that is not in violation that that's as much what the head house is to get to. And I think that height was just, I don't know, if a surveyor were here, a few inches on the height on that. So the head house is not just for the widow's walk, it's for another deck.

CONSTANTINE ALEXANDER: I think what Mr. Sullivan was suggesting, when the contractor was building the addition, the head house, somehow an additional eight inches got added.

ADOLFO PEREZ: Yes, that's what I'm saying. The intention was to meet that height. And I think they tried to following the existing molding line that they thought --

BRENDAN SULLIVAN: It wasn't to increase any kind of liveable space?

ADOLFO PEREZ: No, it simply contained the stairs.

BRENDAN SULLIVAN: I guess I read it as sort of an architectural element that at the time seemed like the right thing to do. And in retrospect, probably should have gotten a determination. The railing obviously is a code issue so that's necessary.

Okay, I'm not sure if I -- is there anybody here in the public who wishes to comment on the matter, 51 Highland Street?

I'm not sure I read in the record a letter that we received from a Jill Horner who lived -- that resides at 54 Highland Street and she writes in favor of granting of the relief. And that is the sum and substance of the correspondence. Okay.

Anything else to add, Ms. McCabe?

ATTORNEY KATHLEEN McCABE: No.

BRENDAN SULLIVAN: Let me close public comment and close the presentation part and take it to a vote.

Tom, what do you think?

THOMAS SCOTT: The 43 feet that you mentioned you said was the current height of the house?

ATTORNEY KATHLEEN McCABE:
Pre-existing but prior to the construction of these elements.

THOMAS SCOTT: Prior to the construction.

ADOLFO PEREZ: The height increase because of the rails. We didn't increase the height of the house, just the rail.

THOMAS SCOTT: Okay. So it went from 43 and the rail and walkway are now at 46?

ADOLFO PEREZ: The railing's at 46.

TAD HEUER: Wait. Why are we here, then, if there's no increase in the height in the pre-existing non-conforming condition? There has to be an increase in the height because otherwise we wouldn't be here, right?

ADOLFO PEREZ: Yes, the rail brings it to 46.

TAD HEUER: But if you're telling us that the rail is a requirement and the rail isn't an element -- do we consider the requisite amount of the rail?

ADOLFO PEREZ: Well, that's one aspect. The other aspect will eight inches on the head house.

ATTORNEY DOUGLAS HENRY: The current code is 35, eight inches and the current code is 35 even though the pre-existing structure is 43.

TAD HEUER: So, I need a rail by building code, but you're not entitled to have a rail without a Variance? Is that essentially where we're going now?

ATTORNEY DOUGLAS HENRY: There's essentially a conflict between the State Building Code and the requirements in Cambridge and Zoning.

BRENDAN SULLIVAN: Zoning.

TAD HEUER: Right. So the fact that you have something at 43 feet and you need a Variance to get to 46, is kind of immaterial because really there shouldn't be either a height or a railing. I mean, I feel odd that we're being seemingly railroaded into granting an additional three feet because the Building Code says you must when the height there is well over anyway and apparently has been increased in height, some substance beyond where it's pre-existing location was.

THOMAS SCOTT: Can you say whether the railing on the pre-existing height of the house -- well, do you know what the height of that railing was? There's no record of it.

ADOLFO PEREZ: No.

THOMAS SCOTT: Okay.

BRENDAN SULLIVAN: Sean?

SEAN O'GRADY: Yes, the answer to the question may be that it depends on the

definition of what that widow's walk is. When the widow's walk is not being walked on, it doesn't need a railing. It can be a roof structure. It can be an ornamental structure. It's only the habitability of it that makes it anecdotal, because I'm the Zoning --

BRENDAN SULLIVAN: Accessibility to it.

SEAN O'GRADY: Right. So I mean we don't say anything flat that you walk on needs a railing. It's only when -- and the triple decker's a good example of that. It's only when you come forward and say we want a deck, we say bingo, you need a railing.

TAD HEUER: That's my other question. We need this railing, we need to access it because it should have been a point that it was flattened off meaning to field access if it were maintenance. If you just need to access it for maintenance, I think it

seems to me more the way we deal with towers, and we've had cases before where we have said you have a tower, if you want to retain the tower as a usable space, you can, but you've got to cover FAR and other relief. If you want to close it up so it's not habitable, you can leave it on your house, you don't need to remove your tower. So I'm trying to understand when I said who's going to be using it? I meant is it going to be simply somebody needs to access it for maintenance? If that's the case, I would suggest that the stairway be allowed for maintenance purposes and only maintenance, and then you can maintain it and there's no need for a railing. If it's going to be for habitable space, I'm less inclined to think that we should be having habitable space there with the addition of a three-foot railing simply because the Building Code says you need a railing because you're trying to shoehorn

into being more usable space where it wasn't designed to be that to begin with. So that's where my, that's where my confusion lies. I'd be happy with either, you know, maintenance only, no railing. And I'm not quite convinced that turning it into habitable space, which is the only reason we would need a railing is something that we should be granting.

BRENDAN SULLIVAN: Well, is it habitable or accessible space? It's accessible space.

SEAN O'GRADY: That's the question in my mind.

BRENDAN SULLIVAN: I think it's accessible space which would thin, the building inspector or the code would require a railing around it.

TAD HEUER: And a triple decker differs why?

TIMOTHY HUGHES: Well, it wouldn't

differ if people were going to use the roof of the triple decker. They would still need some kind of rail.

TAD HEUER: Right. What if you just want to maintain your roof with a triple decker?

TIMOTHY HUGHES: You don't need a railing.

SEAN O'GRADY: I think that's your 36 square feet may be the answer to your question.

BRENDAN SULLIVAN: If you put a deck up there, then obviously you would. Because --

TAD HEUER: But right now all they have the right to is the top of that roof. And if the top of that roof is no different in my mind unless someone can convince me otherwise, the top of a triple decker which I do not -- I can probably look out this window and see no railings, and I see two in

my sight. If that's the case --

TIMOTHY HUGHES: I guess the widow's --

TAD HEUER: Well, that's possibly true. And they're not looking out over an ocean waiting for the whaling ships to return. I'm just failing to see the distinction between a regular flat roof and this particular flat roof. If the only need is for maintenance purposes, I don't understand why you need a railing. And if it's for habitable purposes, I'm not sure why we're granting a three-foot high addition.

THOMAS SCOTT: Is there any intent to use this space for --

ANNETTE NIWISZEWSKI: It's accessibility or repair. But I wouldn't send a repairman up there without a railing. I can tell you that. I mean, it's literally -- it's a small space and it looks, it looks like it belongs to the house, it's

been there. The house across the street has an identical structure on it, different house. No one is going to live there. But when we have leaks in the house, we go up there to see how many tiles of -- how many slate of the roof have fallen off. Who we need to call for what repair.

BRENDAN SULLIVAN: Snow removal?

ANNETTE NIWISZEWSKI: Snow removal if need be. It's a very pitched roof. But I can tell you we're not --

BRENDAN SULLIVAN: You're not putting a chaise lounge up there and having --

ANNETTE NIWISZEWSKI: Too many bees. No need to.

CONSTANTINE ALEXANDER: We could grant relief on the condition that the area of the widow's walk only be used for access to the roof for repairs and maintenance and for no other purpose.

BRENDAN SULLIVAN: And not for recreational use.

CONSTANTINE ALEXANDER: How we're going to enforce that is something else.

ANNETTE NIWISZEWSKI: The point is the owner and the person that brought this lawsuit haven't lived -- the owner hasn't lived in the house for 12 years. So this is something that they grappled with. And I just don't understand why, you know, this is still an issue. First of all, they got the permit to do it. And then someone who was very upset with how they were treated by the builder of this home, found issues that he could complain and bring against them. I mean, this was literally a personal vendetta.

TAD HEUER: But it was a legal issue. I mean it's either a legal issue or it's not. I mean it's either before us or it's not.

ANNETTE NIWISZEWSKI: I understand. It is before you.

TAD HEUER: And when you look at this, I mean, I don't have a lot of sympathy for buying into a lawsuit and saying well, we just happen to be the innocent purchasers of a lawsuit. That would all be fixed, it can just go away because we didn't create the problem. The problem is really that this is a violation apparently because otherwise you wouldn't need Variance of the City of Cambridge's Building Code or the Zoning Ordinance. And that the job of the Board of Zoning Appeal is to uphold the Zoning Ordinance unless there is a hardship demonstrated why you shouldn't. It doesn't matter who started it, who owned it, who finished it. It's that we're protecting an Ordinance. And any violation of the Ordinance needs relief and that's why you come before us.

ATTORNEY DOUGLAS HENRY: Which is why we're here for the Variance today.

ANNETTE NIWISZEWSKI: Right.

ATTORNEY DOUGLAS HENRY: Because this -- I mean, we don't -- you probably don't want to get into the whole tortured history of this litigation because it makes, if you remember, Jarndyce V Jarndyce from Bleak House it makes that look like a short lawsuit. There were, you know, four different lawsuits and nothing happened for ten years on it. And it's really an intent to try to get a Variance for a very minimal relief to clean-up this problem and, you know, it's, it's not the lawsuit --

TAD HEUER: That could have happened ten years ago, right? There's no reason why it has to come today. It's here today, but you very easily could have asked for relief ten years ago, right?

ATTORNEY DOUGLAS HENRY: Well, right. The -- this -- these lawsuits were all filed before the sale to the current

owners. And then for some reason, and we're still trying to figure it out, nothing happened on any of these lawsuits for ten years.

TAD HEUER: But my sense is that the lawsuits were about things that you could have cured if you came and got a Variance, right? If the complaint is that the Building Commissioner improperly granted or properly granted and shouldn't have it, whatever, a permit. If you say yes, we think we're right, but out of an abundance of caution, logically we're going to come to the Board and ask for a Variance just as you're doing tonight. There's nothing that prevented you from doing that 12 years ago. Either you or the previous owners, right?

ATTORNEY DOUGLAS HENRY: Well, the tortured history of this was originally there was a Building Permit granted by the building inspector in Cambridge. And then about 18

months later the neighbors asked the building inspector -- said, we think there are some issues here. And it was not just -- all that's really remains is height issues. But the neighbors said the use of the house was wrong, the FAR was wrong. They had a whole litany list of about 20 different things they thought were wrong with the house. And the building inspector said, I don't agree with you, I think the Building Permit is fine. So they appealed to the ZBA. And the ZBA decided in one hearing all the other things were wrong, but potentially the widow's walk and the head house were slightly over height. At the same time there was a second action brought by the previous owners on the theory that because the existing structure was 43 feet, that this was really just a continuation of a pre-existing non-conforming structure. And so it was minimum relief being granted in that area.

And on that decision the Board said, we can't rule on part of it because there's other appeals going. And so it was remanded. And then, and then both these first two decisions were appealed by both parties. And then the city at that point in time said we think there's a height issue here, and in order to preserve our rights, because we don't want to have a ten year or six year statute of limitation issue, they brought an enforcement action. And then these were all brought by the previous owner's names, and the current owners weren't parties to this litigation. They bought a house that was subject to this litigation. There were things of records, they knew about it. And so, they decided it should be cleaned up, and so they actually went before the Court and got admitted as a party to the litigation. The previous owner, previous abutter Mr. Morgenthal has since moved away. And I

think in your materials you have evidence that he withdrew from the case. He doesn't care anymore.

The problem here is that you have basically three or four different lawsuits that for a few inches on the head house and for a railing on the widow's walk that, you know, that there's still open issues. You know, there's a potential appeal because the ZBA 12 years ago or 11 years ago said we can't rule on this because of this other issue. And I'm not sure that was the right ruling. Maybe they could have ruled on it. So the one thing that everybody agrees upon, and all the cases in the Land Court -- the Land Court judge essentially said there are two issues left here. The head house is eight inches potentially too high, and there's a railing around this widow's walk that is too high, but it's mandated by state Building Code. And we -- and both the city and our clients agree

that if a Variance was granted, it becomes moot, all the cases, and we don't have to deal with this. I mean, some of these pleadings are so old they can't even find the files for them in our court system. No one knows where they are. And it's just going to be an incredible waste of resources. And you as the BZA have the independent decision to make on this. And we just think that, you know, the one thing the city -- and we agreed upon, was that we should file for a Variance because this was a way to resolve all these things by making underlying lawsuits moot.

CONSTANTINE ALEXANDER: The issue really for us, I guess, is the integrity of our Zoning By-Laws. People who were involved in the suit are long gone, as you pointed out. But we're left with the issue where we have a building that doesn't comply with the Zoning By-Law in terms of height, and as a Board we're very, very sensitive to

height issues. We're more lenient if you will with regard to granting variances on other kinds of relief relative to height. And here, this is an unusual set of facts, to be sure. And the height discrepancy or the height violation is rather minimum. That's the one that we're seeking first. Really minimal relief as opposed to the integrity of our Zoning By-Law. And we don't have any -- the essential parties of interest are all gone. Except for yourself. You're a late comer to this issue. And I think that's what Tad has been getting at, and very rightfully so. His point is right. If the railing and State Building Code only happens, as you -- if you inhabit the widow's walk area for habitation purposes. You're just looking for access, it's no different than that three decker. Tad's absolutely right. I'm a little puzzled by this.

TIMOTHY HUGHES: I think that only

talks about the railing. It still doesn't address the head house.

CONSTANTINE ALEXANDER: No, the head house is something else. I agree with you. The head house is something else.

ATTORNEY DOUGLAS HENRY: The head house is, you know, the intent of the drawings was to build it at 35 feet and it was built eight inches too high.

CONSTANTINE ALEXANDER: And I understand the head house. I understand that issue quite well. And that's -- the contractor didn't follow the plans or the requirements of the building permits. Those things happen. I can understand the issue. I still can't get my hands around the widow's walk issue for the reasons that Tad has brought out in his questions.

THOMAS SCOTT: Does the Historical Commission weigh in on this issue?

BRENDAN SULLIVAN: They're silent.

THOMAS SCOTT: They're silent.

My question, then, to the architect is does the railing, does the railing add a significant architectural feature to the building that without it maybe the building looks --

ADOLFO PEREZ: I believe so, yes.

THOMAS SCOTT: -- unfinished?

ADOLFO PEREZ: And we have photographs. It does, I think, I think it's a significant feature. There's a similar rail, and there's a wraparound porch around the whole house that was existing, and whoever took the detail from it. I have the same photograph mounted on a board if you want to see it.

THOMAS SCOTT: Sure.

BRENDAN SULLIVAN: I think to answer your question that the absence of the railing would be noticeable and blanket. And lacking element.

THOMAS SCOTT: Yes.

BRENDAN SULLIVAN: Would be my reading of it.

ADOLFO PEREZ: You can see this rail. This is the side of the house. But there was an existing porch and existing porches that were not in violation, but that rail existed. That's where we took the detail, and that's the rail in question. And there it is.

So the platform wasn't in violation, just the rail. And because of this steepness of the site, I think that's what Kate was trying to allude to. It may have been hard to get through the grade.

TAD HEUER: I mean doesn't the steepness of the site mitigate against you in a way? Because usually what we have are people with flat sites and they go up to height. Here you've got a not flat height, you've got a pretty prominent place on

Highland Street because you're at the peak of the hill, and you're going above 35 feet which already putting you well above --

ADOLFO PEREZ: It's 43.

TAD HEUER: Sure. And you're adding three feet.

ADOLFO PEREZ: Right.

TAD HEUER: You're at a high point of the hill, your house is eight feet higher than would be allowed if it were built today, and you want to add another three feet to it. It would seem you'd have a better argument if you were in a dell and you said actually it's only going to, you know, mean grade of 35. Here you're up, you're going up, and then you're going up again.

ADOLFO PEREZ: I was just mentioning the grade because I think that was one of the things that led to the confusion in establishing what the average grade around the house was. If there was a porch around

the house, that's why I mentioned it.

TAD HEUER: Right. My thought is that it makes it more obvious that it's going above height when you're already sitting on top of the hill on a house that's taller than it would otherwise be allowed to be built by right.

ADOLFO PEREZ: At the same time there's nobody around it to look down on it. It's a very large site.

THOMAS SCOTT: How many square feet does the rail encapsulate?

ADOLFO PEREZ: It's been a long time since I looked at it. 10 by 12 maybe.

ANNETTE NIWISZEWSKI: 10 by 10.

ADOLFO PEREZ: 10 by 10. It's very small area. It's not unusual. About 100 square feet.

ANNETTE NIWISZEWSKI: It's below the chimney.

ADOLFO PEREZ: But I think it is a

significant feature of the house. It would be lose something if you took it down.

BRENDAN SULLIVAN: Well, it's the period of the house, and that the railing is a feature above that house of that period.

ADOLFO PEREZ: Absolutely. I think that's the argument architecturally if you will.

BRENDAN SULLIVAN: And the absence of it would be noticed.

Tim, any questions?

TIMOTHY HUGHES: I have no questions. My comment is that I do think that the head house was an honest mistake by the builder, and I'm in favor of that. And I do think that the railing is unobtrusive in the fact, you know, that it's tucked between two chimneys which are actually taller and don't, you know, fall under the jurisdiction of the height restrictions. And I don't think it makes the building look huge. I

think it is an architectural detail that I think would look -- it would be missed if it wasn't there. So I'm in favor of it.

BRENDAN SULLIVAN: Anything to add or questions?

TAD HEUER: Not particularly. I don't, I don't see a hardship that would merit deviating from the intent and purpose of the by-law.

BRENDAN SULLIVAN: Okay. Any other questions?

THOMAS SCOTT: I think what Gus said, could we potentially condition the approval so that it's not used as a deck or, you know, gathering for parties?

BRENDAN SULLIVAN: Not used for recreational purposes.

CONSTANTINE ALEXANDER: On that basis I would support granting the relief. I have no problem with the head house on the widow's walk, but I wouldn't do it otherwise.

BRENDAN SULLIVAN: Let me make a motion to grant the relief requested. And I'm basing it on these drawings; is that correct? Or do these drawings even -- do they reflect the work that's been completed?

ATTORNEY KATHLEEN McCABE: Yes.

BRENDAN SULLIVAN: Let me reference them. I make a motion to grant the relief requested based on the detail of the widow's walk and head house based on the drawings that are entitled, "Nova N-o-v-a residence, 51 Highland Street, dated 7/21/2003."

The Board finds that a literal enforcement of the provisions of the Ordinance would involve a substantial hardship to the Petitioner.

That denial of the Variance would require the Petitioner to remove the elements of the widow's walk and the addition of the head house which are of violation. Such removal would not only be a considerable

expense and hardship on the Petitioner, but they would no longer have access to the roof for maintenance and removal of snow and other elements.

The Board also finds that the removal of these features would result in the loss of the permanent architectural feature of the house constructed -- in what year, the house?

ADOLFO PEREZ: The original house?

BRENDAN SULLIVAN: Yes.

ADOLFO PEREZ: Or the renovation?

BRENDAN SULLIVAN: The original house.

ADOLFO PEREZ: 1880.

BRENDAN SULLIVAN: In the 1880s.

ANNETTE NIWISZEWSKI:
1880-something.

BRENDAN SULLIVAN: And that the head house is consistent with the style of the period of the house.

The Board finds that the hardship is

owing to the height of the house, the pre-existing, non-conforming nature of the house. The difficulty at the time in 1998 to adequately survey and determine the actual mean grade of the house which led to the encroachment on the height restriction by an additional eight inches.

The Board finds that desirable relief may be granted without substantial detriment to the public good, and relief may be granted without nullifying or substantially derogating from the intent and purpose of the Ordinance.

On the condition that the widow's walk be for maintenance purposes only and not be for any recreational purposes.

Anything else to add?

All those in favor of granting the relief?

(Show of hands.)

BRENDAN SULLIVAN: Four in favor.

(Sullivan, Alexander, Hughes,
Scott.)

BRENDAN SULLIVAN: Opposed?

(Heuer.)

BRENDAN SULLIVAN: Any comment?

TAD HEUER: I find that there's no substantial hardship, and because there is no rail required for maintenance purposes. That architectural feature is not demonstrated adequately, in my opinion, as being a pre-existing feature. Even though it may be a portion of the house as designed at the time, and I don't believe the height is a hardship here, particularly that the height of building is above grade on a hill that's above pre-existing non-conforming. It's adding additional height to that. And nor do I believe that the issue of grade would create a hardship seeing as the grade only accentuates and does not mitigate the request of the property.

BRENDAN SULLIVAN: Good.

The Variance on the motion is granted.

* * * * *

(7:35 p.m.)

(Sitting Members: Brendan Sullivan,

Constantine Alexander, Timothy Hughes, Tad Heuer, Thomas Scott.)

BRENDAN SULLIVAN: The Board will hear case No. 10105, 76 Fayerweather Street.

Introduce yourself for the record.

ERIK SIMONSEN: I'm Rick Simonsen. And this is Kimberly Simonsen. We own 76 Fayerweather.

BRENDAN SULLIVAN: Okay, since last we spoke and the Variance was granted some windows were added and locations changed. My understanding is that the building inspector or contractor assumed that the windows shown in the original drawings were part of the Building Permit, and the relief for that was granted and that the building inspector picked out the windows and were in fact in violation of the side yard setback and requiring a Special Permit.

KIMBERLY SIMONSEN: Actually no windows were added from the original

application. They were just moved.

BRENDAN SULLIVAN: The location --

KIMBERLY SIMONSEN: The location was moved, you know.

BRENDAN SULLIVAN: Were they not expanded upon --

KIMBERLY SIMONSEN: No.

ERIK SIMONSEN: They were going to be closer together, then they were just moved further apart.

KIMBERLY SIMONSEN: And two windows were moved over because of a structural supporting beam.

BRENDAN SULLIVAN: So, if I look at the drawing --

KIMBERLY SIMONSEN: On the south facing --

BRENDAN SULLIVAN: A1 first floor plan, the new windows --

KIMBERLY SIMONSEN: On the second floor.

BRENDAN SULLIVAN: On the second floor?

KIMBERLY SIMONSEN: That's right.

BRENDAN SULLIVAN: Which would be so noted, windows on the north elevation to be revised; is that correct?

ERIK SIMONSEN: Yes.

BRENDAN SULLIVAN: And the ones in the back were granted by way of relief from the Board. And the studio windows, they were changed also?

KIMBERLY SIMONSEN: That -- no, those weren't changed. Not from the original application.

BRENDAN SULLIVAN: Okay. So, it was basically the ones in the laundry and master bath; is that correct?

KIMBERLY SIMONSEN: Yes. But the laundry wasn't part of the original application because we made the setback on that side. I'm just confused on which ones

we're talking about.

ERIK SIMONSEN: I think the ones we're talking about are in the master bedroom.

BRENDAN SULLIVAN: Okay. Can you just sort of point those out or circle them.

KIMBERLY SIMONSEN: Right here. These are the ones that changed. And these two -- I don't know where the original approval was though.

BRENDAN SULLIVAN: The original approval was for the back.

KIMBERLY SIMONSEN: Was for these three.

BRENDAN SULLIVAN: In the back porch area. Which was the porch, I think, at one time enclosure.

KIMBERLY SIMONSEN: Right.

BRENDAN SULLIVAN: That was part of the original.

ERIK SIMONSEN: Right. So they

were -- this looks like a new plan. So they were, they were just together here. And then instead of putting them together, we moved them apart.

BRENDAN SULLIVAN: Right.

ERIK SIMONSEN: Just a few feet.

BRENDAN SULLIVAN: Okay.

And those were done during the construction and picked up by the building inspector as being in of the violation of the setback.

Any questions?

CONSTANTINE ALEXANDER: Just one question. Have you spoken to the neighbors that would be affected by the relocation of the windows?

KIMBERLY SIMONSEN: Yes.

ERIK SIMONSEN: And they said they didn't have any problem with it.

BRENDAN SULLIVAN: Any questions?

TIMOTHY HUGHES: No, I'm good.

BRENDAN SULLIVAN: Let me make an actual motion for Special Permit.

TAD HEUER: Are you going to open it up for public comment?

BRENDAN SULLIVAN: Is there anybody here who wishes to speak on the matter?

(No Response.)

BRENDAN SULLIVAN: I see none and there is no letter in the file.

Let me make a motion to grant the Special Permit for the relocation of windows as per the drawing dated 4/05/11.

The Board finds that the requirements of the Ordinance can be met. That the proposed alteration for windows located in the existing non-conforming structure will not create further violations of the dimensional requirements.

The Board finds that traffic generated or patterns of access or egress would not cause congestion, hazard or substantial

change in the established neighborhood character.

The Board finds a continued operation and development of adjacent uses as permitted to the Zoning Ordinance would not be adversely affected by the nature of the proposed use. That there would not be any nuisance, hazard created to the detriment of the health, safety or welfare of the occupants of the proposed use or to the citizens of the city. And that the proposed use would not impair the integrity of the district or adjoining district or otherwise derogate from the intent and purpose of the Ordinance.

All those in favor of granting the Special Permit.

(Show of hands.)

BRENDAN SULLIVAN: Five in favor.

(Sullivan, Alexander, Hughes, Heuer, Scott.)

ERIK SIMONSEN: Thank you.

* * * * *

(7:40 p.m.)

(Sitting Members: Brendan Sullivan,

Constantine Alexander, Timothy Hughes,
Thomas Scott, Douglas Myers.)

BRENDAN SULLIVAN: The Board will
hear case No. 10099, 100 Hampshire Street.

ATTORNEY SEAN HOPE: Good evening,
Mr. Chair, Members of the Board. For the
record, attorney Sean Hope, 130 Bishop Allen
Drive in Cambridge. I just want to thank the
Chair for the extra time that allowed us to
meet with the abutters.

CONSTANTINE ALEXANDER: Were you
successful?

ATTORNEY SEAN HOPE: It was. We
feel it was successful. But you'll also hear
from them as well.

So to rehash this. I'm here with
Mr. Benzan and his family. Say your name for
the record.

REYNALDO BENZAN: Reynaldo Benzan.

ANGELICA BENZAN: Angelica Benzan.

ATTORNEY SEAN HOPE: So, this is a

Variance to reconstruct some rear egress stairs that are within the side yard setback as well as to add a deck. The last time we were before the Board there was obviously some concerns by the abutter on the size of the deck. There was a meeting. I was not present. It was just the neighbors themselves. They talked about sight line and privacy issues was the main concern of the meeting.

From that meeting Mr. Reynaldo, and the architect, the three of us got together and we tried to reduce the deck to a size that we thought was going to be agreeable to the neighbor as well as meet the family needs and concerns. As I said, again, they live in a second floor of a two-family, and part of the need for the outdoor deck, as well as the reconstructed steps, was to have some extra space to allow for things like recycle bins, bicycle storage, as well as to have some

outdoor privacy. There is a rear yard, but the existing stairs are extremely steep and part of the project would actually take the stairs and be able to jog them away from the property line.

So, in this back meeting -- there wasn't a meeting of the minds at the neighborhood meeting. There was a difference. I think we came to about a foot and a half. And, you know, for the neighbors that foot and a half actually changed the sight line. They're going to speak for themselves. One of the issues were, you know, this is what we have now. And leaving that foot and a half difference. But from our point of view that foot and half difference changes the difference of having a chair pulled out from a table as well as functionality.

So, in this last meeting we went in the back and we agreed upon a reduced size of the

deck. The proposal you have in front of you is nine feet, ten inches, 90 square feet. What we agreed upon in the back room was eight and a half feet. So that six inches allowed for a sight line that we felt for the abutters that would not block what they currently have, and it was just enough that we actually would be able to functionally use some of the outdoor space. So, we would want to move forward to amend the plans after the public comment.

BRENDAN SULLIVAN: Can you mark up one of those exactly what the change would be?

ATTORNEY SEAN HOPE: And so just to be clear for the record, too, it was the depth of nine feet, that was the issue. And the width was ten feet, but depth was the part that would block the sight line. I'm going to adjust that we have nine feet here. I'm going to do eight feet, six inches is what we agreed upon.

BRENDAN SULLIVAN: So that's from the slider basically away from the house. Side to side, that remains ten feet?

ATTORNEY SEAN HOPE: Yes.

BRENDAN SULLIVAN: And the stairway remains the same. So basically all you're doing is pushing everything back?

ATTORNEY SEAN HOPE: Yes.

BRENDAN SULLIVAN: Okay. Just mark it up on the other one, too.

Any other questions from the Board at this time?

CONSTANTINE ALEXANDER: I have a question. Maybe I'm opening up a can of worms, maybe I shouldn't. The issue was at the last hearing was privacy. It wasn't so much the size of the deck. The size of the deck led to the concerns about privacy, people on the deck looking into the neighbor's yard. Why didn't you think about putting up, instead of a normal deck railing,

a solid wooden wall, six foot high? That would prevent anybody on the deck from looking at the neighbor's property and the neighbor's looking at what's going on on the deck. And you could have had the size you wanted?

ATTORNEY SEAN HOPE: So part of it was privacy was also an issue, but I think what came out of the meeting was there was a second floor window that the abutters have, and so when they look out and from what we heard today, that's their major window. There's tallest buildings around. So, that's their one major window. So they have the existing staircase right now, and the spindles there. So they felt that the deck, the way it came out, it actually reduced what they actually have visually. So it came less about privacy. They both have a good size backyard. It's already tight. It's already Cambridge. But they felt that the

size of the deck was what it came out to. If we reduced it, it would allow them to have more of a sight line.

CONSTANTINE ALEXANDER: Okay.

BRENDAN SULLIVAN: Okay. Any other questions, Doug or Tim?

Let me open it to public comment. Is there anybody here who would like to comment on the matter of 100 Hampshire Street? Please come forward and identify yourself. Please spell your last name for the record as it's being recorded.

DIEGO MATHO: Diego Matho M-a-t-h-o. I live with my wife. We are neighbors, next-door neighbors. We are at 98 Hampshire. Lived there for 17 years. We have no problem with the deck on the -- we live on the other side of --

BRENDAN SULLIVAN: So facing the house, you're on the left?

DIEGO MATHO: Correct. And the

deck would be on our side, and we have no problems with the deck whatsoever. The neighbors have incredibly improved the house and the living conditions in that area. In fact, the -- we used to have a shared fence and we now have an open -- you have the photos. We have an open yard. No problem whatsoever.

BRENDAN SULLIVAN: Okay.

TIMOTHY HUGHES: Thank you.

BRENDAN SULLIVAN: Anybody else wishes to speak on the matter? Yes. If you would please come forward.

DOUGLAS HARRELL: So my name is Douglas Harrell. I'm speaking on behalf of the Harrell family. My wife spoke here last week. So we're the owners at 12 Union Street in Cambridge. And so I'm just updating our response. So, we met with the Benzam family and mutually communicated our concerns. And we received a letter from Hope Legal Offices expressing their desire to reduce the deck to

nine feet and we thank them for their willingness to compromise. So, the windows on the rear of our home are the only ones that look out into open space otherwise this wouldn't have been a major issue. We wouldn't care very much.

So Mr. Hope's letter indicated that the current proposed would greatly reduce, if not eliminate any proposed obstruction for our backyard or window because existing stair landing would block most, if not all, of the deck. Well, in order for -- to maintain the current sight line, the deck would have had to be seven feet, six inches. That would maintain the current sight line. So we agreed to compromise to extend a foot into the sight line.

The privacy was also a concern. It does look over our outdoor space, and they would be elevated over our only outdoor space that we have, and there's no capacity to

construct a fence to block the space. And of course there might be other impacts. But we're willing to forego the other issues so the Benzam family can enjoy a deck. I know it's important to them. And even though their privacy impacts, as I mentioned, a lot of the other things can impact privacy as well. So we hope that they can enjoy the deck at the depth of eight feet, six and that's agreeable so we can move forward as new neighbors and potential friends.

BRENDAN SULLIVAN: Doug, you're in support of this particular plan that's --

DOUGLAS HARRELL: I guess I should take a look. Right. We're in support of that.

BRENDAN SULLIVAN: Great, thank you.

Is there anybody else who wishes to speak on the matter?

(No Response.)

BRENDAN SULLIVAN: I see none. There is considerable letters of support which I believe I read into the record the last time. So we do not need to do that again.

Okay, anything to add? Any comments from the Board or concerns?

TIMOTHY HUGHES: I'm good with it.

BRENDAN SULLIVAN: Doug any?

DOUGLAS MYERS: Nothing.

BRENDAN SULLIVAN: Now, does that change the dimensional form by point something, something?

ATTORNEY SEAN HOPE: Right. 0.00 something. 90 square feet is what we had so now we're reducing it by half a foot.

BRENDAN SULLIVAN: Half a foot by ten? So five.

TIMOTHY HUGHES: Five feet.

BRENDAN SULLIVAN: What I probably would ask that we change the decimal point at

some point on the dimensional form just to correct the revised plan. Let me make a motion to grant the request to construct the deck on the rear of the house as per the plans submitted. Entitled, "Existing and proposed deck plans and elevations, 100 Hampshire Street," initialed by the Chair and dated.

The Board finds that a literal enforcement of the provisions of the Ordinance would involve a substantial hardship to the Petitioner because it would preclude them from having a much needed outdoor space from the second level of the house, which is that they live on. That access to the yard is very limited, and only by way of a very steep stairway, that this addition is not desirable or conducive to a family living.

The Board finds that hardship is owing to the siting of the house on the lot. The

existing non-conforming nature of the house; is that correct? With regard to setbacks.

The Board finds that it is just slightly over the FAR.

And also the Board notes the Petitioner's willingness to work with the neighbors and to reduce any impact.

The Board finds that desirable relief may be granted without substantial detriment to the public good, and relief may be granted without nullifying or substantially derogating from the intent and purpose of the Ordinance.

All those in favor of granting the relief?

(Show of hands.)

BRENDAN SULLIVAN: Five in favor.

(Sullivan, Alexander, Hughes, Scott, Myers.)

(7:50 p.m.)

(Sitting Members: Brendan Sullivan,

Constantine Alexander, Timothy Hughes, Tad Heuer, Thomas Scott.)

BRENDAN SULLIVAN: Anybody here on the 52 Brattle Street, One Story Street other than the petitioner?

Only for the record I will state that that matter is going to be heard in conjunction with the other case. In case there was anybody here from the general public, I wanted to alert them of that. That will be heard at 9:15.

* * * * *

(7:50 p.m.)

(Sitting Members: Brendan Sullivan,

Constantine Alexander, Timothy Hughes, Tad Heuer, Thomas Scott.)

BRENDAN SULLIVAN: The Board will hear case No. 10084, 141 Portland Street.

Is there anybody here interested in 7-9 Crescent Street?

(No Response.)

BRENDAN SULLIVAN: Mr. Kelley, if you would introduce yourself and counsel for the record again.

FRANCIS KELLEY: For the record, my name's Francis Kelley. I'm an employee for the SCI Communication. I'm here representing AT&T. With me on the right is Ed Pare. He's an attorney with --

ATTORNEY EDWARD PARE: With Brown Rudnick.

BRENDAN SULLIVAN: Let me just say this is a case not heard; is that correct?

FRANCIS KELLEY: Right.

ATTORNEY EDWARD PARE: There was a

sign issue.

BRENDAN SULLIVAN: There was a posting problem. It's a Special Permit application for a mobile communication facility. The Board of Zoning Appeal shall consider the following:

The scope of limitations proposed by any licensing, secured by any state or federal agency. And your presentation is that there are none. There are no limitations.

ATTORNEY EDWARD PARE: There are none.

BRENDAN SULLIVAN: You're representing a duly licensed carrier.

ATTORNEY EDWARD PARE: By the FCC, correct.

BRENDAN SULLIVAN: By the FCC. That this is not in a residential zone; is that correct? The Zoning District 1B.

ATTORNEY EDWARD PARE: Industrial

B.

BRENDAN SULLIVAN: Industrial B. Hence that there need not be any residential considerations.

And that we will now entertain the extent by which the visual impact of the various elements shall be minimized to the user existing mechanical elements on the building. And a building color texture and effective means to reduce the visual impact of the facility on the site.

FRANCIS KELLEY: We have a number of these. Is that the right one?

ATTORNEY EDWARD PARE: I think so. April 20th.

CONSTANTINE ALEXANDER: April 20th is the one in our files.

FRANCIS KELLEY: Here are some extra ones to be safe.

ATTORNEY EDWARD PARE: Hopefully we'll be done soon, Mr. Chairman.

BRENDAN SULLIVAN: Until the next G comes along.

TAD HEUER: Until the next G.

BRENDAN SULLIVAN: And then we'll go into the Hs. Okay.

ATTORNEY EDWARD PARE: Well, Mr. Chairman, as part of AT&T's network upgrade to enhance its data delivery services through 4G, we're installing a new network called Long Term Evolution, which I'm sure you've heard plenty about and you'll here plenty more about. As part of that installation and with this one, typically we install three additional LTE antennas. In this instance in -- on sheet A1 of the plans, and I'll turn them this way, the black darkened antennas are the three new ones that are being added. There are currently six AT&T antennas on the building as a whole. We're proposing to add two antennas to the existing penthouse here, to the west of the

site. And one LTE antenna to the east, on the far side, which is actually a bit taller. It could probably be best seen on the photo simulations. If you take a look at photo location 1, the existing locations, flip to the proposed conditions, you'll see the new antennas mounts, one being attached to the screen wall and the other on the side of the building. And we provided a somewhat of an enhanced insert to show you where those antennas are -- I'm not sure you have the right one.

FRANCIS KELLEY: Those will be the right ones.

CONSTANTINE ALEXANDER: I have to observe -- these photo simulations continue to be clear as mud. I mean, come on. I mean -- you can't tell the visual impact from these photo simulations.

ATTORNEY EDWARD PARE: Well, we're merely adding one antenna.

CONSTANTINE ALEXANDER: I don't care what you're adding. You should be able to show us through the photo simulations. We've gone through this time and time again. And you keep coming back with these things that obfuscate rather than illustrate.

ATTORNEY EDWARD PARE: Well, on photo 1 you see where the antenna's going over on the right-hand side. On the left-hand side you can flip to photo 4, photo 2 to get a better sense of where that antenna's going. But we're taking them from public areas, and there's a small antenna going on the facade of the building.

BRENDAN SULLIVAN: (Inaudible.)

CONSTANTINE ALEXANDER: I know.

BRENDAN SULLIVAN: At 4:30 in the afternoon --

CONSTANTINE ALEXANDER: 4:30 in the afternoon, it's all shadows.

ATTORNEY EDWARD PARE: And again on

photo 5 I think you can get a better depiction of the proposed condition.

CONSTANTINE ALEXANDER: Photo 5 is clearer, actually, than all of them in my opinion, because I can see something.

TAD HEUER: Coincidentally you can't see any of the equipment, though. Well, three, four and five are the equipment on this one.

ATTORNEY EDWARD PARE: And the equipment -- our equipment cabinets are in the center of the roof in between here.

BRENDAN SULLIVAN: You're on page A1, are you, Counsel?

ATTORNEY EDWARD PARE: A1 is what I referred to, yes.

BRENDAN SULLIVAN: Okay.

TAD HEUER: I have a question on the coloring. It seems that some of these -- this white top of the facade flush to the brick facade, I can't tell if that was

concrete or a step back or not. Is that the peak of the building?

ATTORNEY EDWARD PARE: I mean, looking at No. 5, photo 5, it appears at least on the front side or the side facing the two antennas which are not ours, it appears to continue up. It's hard to tell if it was setback a little bit.

TAD HEUER: And I guess my question is: Does the paint to match -- it looks like on the plans that they go up to the roof line, which I presume is the top of the brick?

FRANCIS KELLEY: If you look at the A1 photo, it shows that it --

ATTORNEY EDWARD PARE: Let me show you on the plans.

TAD HEUER: All right.

ATTORNEY EDWARD PARE: You see that right there.

TAD HEUER: Right, okay.

FRANCIS KELLEY: And these are on

the lower roof that doesn't have that same, the lower penthouse that doesn't have that same covering.

TAD HEUER: Yes, it does. Look at photo location 1, it definitely has the same coloring.

My question is if these are really paint to match, you've got tough paint to match when you're going from street level up, it gets more elongated as you go up. But that red on white wouldn't necessarily be a paint to match, I wouldn't think, right? As a matter of fact, it's almost the -- actually, not a definition of not being matched, right?

TIMOTHY HUGHES: Let the record show that counsel is nodding his head.

ATTORNEY EDWARD PARE: And to the extent they need to be painted beige at the top and red to match the brick, they will be.

TAD HEUER: Okay.

TIMOTHY HUGHES: You know, this is

an interesting set of photo sims where the street names don't relate to anything in the neighborhood. Edwin Land Boulevard, Binney Street. The Broadway one is correct.

TAD HEUER: You could take it from Edwin Land Boulevard if you wanted.

ATTORNEY EDWARD PARE: What do you have?

TIMOTHY HUGHES: I have a shot HERE where Hampshire meets Broadway, and it says second and Binney.

I got another one that says -- you got the building in there, you just have all the wrong streets -- half of the wrong street names. This is definitely Broadway. This is not Edwin H. Land Boulevard.

CONSTANTINE ALEXANDER: Yes.

TIMOTHY HUGHES: And I don't think you can see (inaudible) street from here.

CONSTANTINE ALEXANDER: I don't think so, not without binoculars.

TIMOTHY HUGHES: X-ray vision is more like it.

CONSTANTINE ALEXANDER: Yes.

ATTORNEY EDWARD PARE: Mine are labeled properly.

BRENDAN SULLIVAN: Is any of the proposed equipment going to be higher than the roof? I mean, there's a lot of stuff up there.

TAD HEUER: Yes.

ATTORNEY EDWARD PARE: Here's the elevation.

BRENDAN SULLIVAN: They may not all be yours?

ATTORNEY EDWARD PARE: They're not all yours. The antennas are darkened and the equipment cabinets are here.

BRENDAN SULLIVAN: So it does not stand higher than the parapet wall, if you will.

ATTORNEY EDWARD PARE: That's

correct.

BRENDAN SULLIVAN: That's the presentation?

Is there a way of getting, you know, I'm looking at A3.

TAD HEUER: You go first.

TIMOTHY HUGHES: I don't think you're getting value on your photo sims.

TAD HEUER: Can I emphatically state that you are not getting -- and I'm not joking -- you are not getting value from the company doing your photo sims. Whoever is doing them, they are not giving you value. We've had this discussion so many times on whoever is doing it, who is doing it? Hudson Design Group. Hudson Design Group is giving a terrible, terrible account of themselves. And we are stuck having to look at Hudson Design Group's or whoever AT&T Mobility hires seems to do an inadequate job on these photo sims. And we've seen probably six to eight

of these over the last six months, and we have to spend our volunteer Thursday nights sitting and looking at inadequate photos from one of the largest corporations in the country. That's unacceptable. I don't know how much longer I can say that.

CONSTANTINE ALEXANDER: I'm planning to abstain on the vote because your submission is inadequate. You're not going to get my vote. I have no basis of reaching a decision on the basis of these photo simulations.

TIMOTHY HUGHES: It is better. It is enhanced. The lighting is better on it. And the labelling is correct.

ATTORNEY EDWARD PARE: If the labelling is correct, it's probably also a better printer because it's mine.

TIMOTHY HUGHES: Take a look at that one, Gus, it's a little better.

TAD HEUER: Same one, but

it's -- there's different names and it's --

CONSTANTINE ALEXANDER: Oh, you're right.

TIMOTHY HUGHES: The labelling is better and the lighting is better.

TAD HEUER: It's actually a completely different submission than the ones we received.

FRANCIS KELLEY: Actually these may not be as -- they're better than the ones that were in the package.

BRENDAN SULLIVAN: So the April 20th would be the --

TAD HEUER: We have various.

CONSTANTINE ALEXANDER: I have an April 20 here.

FRANCIS KELLEY: Yeah, there's different revisions here that were handed out in April.

CONSTANTINE ALEXANDER: I reiterate what I said about the inadequate submissions.

We can't weigh -- we don't even know what we're getting. We're getting conflicting photo simulations. Thank you anyway.

BRENDAN SULLIVAN: Tom, anything?

THOMAS SCOTT: I think they should continue and get better photo sims, too.

TIMOTHY HUGHES: This one should be in the record long enough for people to look at it, you know.

TAD HEUER: That's correct.

BRENDAN SULLIVAN: All right. Now, getting back to sheet A3, anyhow. I guess my comment would be on the proposed antenna detail, beta and gamma sectors is that the height not be greater than the length than the antenna, which is a given and I think a prerequisite.

TAD HEUER: I have a further comment on that.

Sean, have we had this building before us recently? 141 Portland.

SEAN O'GRADY: Yes. There's other stuff up there.

TAD HEUER: Peter Cook come in for this building, maybe?

SEAN O'GRADY: I'm not good enough to do that.

TAD HEUER: Because this building looks familiar, and I apologize for not having gone back to our files and looked at the previous grants on this building, but I believe either this building or the building in a close vicinity, we had a long discussion about pipe mounts about eight months ago perhaps. And we inquired about pipe mounts because we've been concerned about pipe mounts for several years now. And we asked is this all you've got? And he said, No, as a matter of fact, we have essentially a swivel mount.

ATTORNEY EDWARD PARE: A what?

TAD HEUER: Swivel mount. You're

up against the building like this, and you're antenna pivots within your swivel, has enough play to go this way. But you've taken out the pipe and you've brought it more -- you know, either more flush or more relevantly casting less of a shadow when it's hit because there is only one piece there. You don't have the antenna itself and the pipe behind it even if technically you can get maybe an inch or two closer on the pipe mount. You get a lower profile because you have only one thing casting the shadow rather than two. And what's noticeable particularly, and you may not see the antenna, but on a bright day you're looking up and you're seeing the face of the building and you see the shadows coming off of there. If you get multiple shadows coming off an antenna, it's much more visible than if you only have the minimal amount of the equipment up there. So I agree with the Chairman saying that if these are going to be

pipe-mounted, they should be short pipes. I think we would also ask that all the cables and other appendages that go to antennas be covered and painted to match. On the antennas I think they would have to be painted to match the actual things that they're sitting on. So white tops and red bottoms. But I also think we have approved a case in the recent past that has not required pipe mounts on a building, either this building or a building in this vicinity, precisely because it was able to be more flush to the building and because it would cast less of a shadow. And I would ask that if this is going to be continued, which it sounds like it would be, that be investigated and you come back with a plan that suggests either that solution or a very definitive explanation for why it can't be done knowing that we have approved the plan which has been done.

BRENDAN SULLIVAN: Yes, I mean, I

don't know why it has to sit, No. 1, eleven inches off the building from the face of the building to the space to the pipe mount eleven inches. One.

And then you've got brackets and then you've got antennas. So then you've got -- there's more than a three-dimensional odd, you know, really protruding.

TAD HEUER: Right.

BRENDAN SULLIVAN: And it becomes, to my mind, quite upsetting and probably unnecessary.

TAD HEUER: Yes.

THOMAS SCOTT: And one other thing, they should make sure when they take these photos, there are no tree limbs in front of the location of the antenna, because that just obscures our view to what it is we're trying to approve.

BRENDAN SULLIVAN: The photo sims are really overly inadequate.

ATTORNEY EDWARD PARE: I get the message.

BRENDAN SULLIVAN: From AT&T. By way of AT&T to Hudson.

So how did you want to proceed or did you want to proceed or did you want to kick it back and have them come back and say there is no alternative or no, there is none and then we will have an alternative answer? Either we agree with the answer or we'll have an alternative.

TAD HEUER: We'll agree with the answer or there will be an alternative resolution (inaudible).

BRENDAN SULLIVAN: Okay. A possible request for a continuance?

ATTORNEY EDWARD PARE: Yes, we would like a continuance.

CONSTANTINE ALEXANDER: Case heard.

TIMOTHY HUGHES: Case heard.

BRENDAN SULLIVAN: Motion, then, to

allow the Petitioner to adequately address the issues of the photo simulations, No. 1.

Alternative method of mounting the proposed antenna as per the comments having it more for an alternative way or alternative method with the goal of being more of a flush mount to the building. I think we do have a waiver.

And Sean, when are we out?

SEAN O'GRADY: July 28th.

TIMOTHY HUGHES: I can't do that.

SEAN O'GRADY: Then you're August 11th.

BRENDAN SULLIVAN: This matter will be heard, continued until August 11, 2011, at seven p.m.

On the motion to continue this matter.

CONSTANTINE ALEXANDER: On the conditions that are usual.

BRENDAN SULLIVAN: And on the condition that any additional information be

submitted, that it be submitted by the five p.m. on the Monday prior to the hearing of August 11th.

CONSTANTINE ALEXANDER: Hopefully there will be additional material. The photo simulations.

BRENDAN SULLIVAN: All those in favor of the motion.

(Show of hands.)

BRENDAN SULLIVAN: Five in favor of continuing it.

(Sullivan, Alexander, Hughes, Heuer, Scott.)

BRENDAN SULLIVAN: Okay.

* * * * *

(8:10 p.m.)

(Sitting Members: Brendan Sullivan, Constantine Alexander, Timothy Hughes, Tad Heuer, Thomas Scott.)

BRENDAN SULLIVAN: The Board will

hear case No. 10086, Five Cambridge Parkway.

Mr. Kelley again, et. al.

ATTORNEY EDWARD PARE: Again, Edward Pare, Brown Rudnick, representing AT&T, New Cingular Wireless PC, LLC AT&T.

BRENDAN SULLIVAN: The reason this was continued was failure to post. Are you aware of a letter from the Planning Board at all?

FRANCIS KELLEY: Yes, there was a letter from the Planning Board based on the design where we were just replacing the existing antennas, and we were adding and painting to match that they would like to see some type of enclosure on it. And maybe a second letter.

CONSTANTINE ALEXANDER: Did you respond to that comment? I mean in terms of modifying your plans?

FRANCIS KELLEY: We did.

BRENDAN SULLIVAN: This is the April

25th letter; is that correct?

Just for the Board's refreshment, the Planning Board reviewed this application and recommends that if the Special Permit is granted, that further efforts be made to minimize the impacts on the public way. One suggestion is to construct an enclosure for all of the antenna that is in the same dimension as the sign face. This is a prominent location serving as a gateway to Cambridge, and the Sonesta Hotel sign is significant. Inside the location antennas installed on the sign face would be a very distracting sight.

FRANCIS KELLEY: And actually, the design has been changed again that we were actually -- we were proposing to bump them out and enclose them. And the new design is we're replacing the actual sign itself with some material so that it will be the same phase. We're going to paint it to match the

same color as the sign.

CONSTANTINE ALEXANDER: This reflecting it.

FRANCIS KELLEY: It does. And mount the antennas behind.

CONSTANTINE ALEXANDER: Did you show this to the Planning Board?

FRANCIS KELLEY: They saw the plans where were boxing it in. They haven't seen that because this was a -- we didn't realize we could do this until after we went up there.

ATTORNEY EDWARD PARE: If that one is boxed in --

CONSTANTINE ALEXANDER: So as I understand it, we do not have the views of the Planning Board on what's before us tonight?

FRANCIS KELLEY: On the new -- they saw the boxed in one.

CONSTANTINE ALEXANDER: They didn't like the boxed in, you know?

FRANCIS KELLEY: The Planning Board

liked the boxed in one.

CONSTANTINE ALEXANDER: Okay.

FRANCIS KELLEY: They didn't like us mounting our antennas up there. And they recommended we box them in.

CONSTANTINE ALEXANDER: Okay.

FRANCIS KELLEY: They saw the proposal to box them in and the box would have to stick out from the sign. And they were fine with that. They haven't seen the new design because we just had completed it prior to their -- after the last hearing that they had.

ATTORNEY EDWARD PARE: The new design actually removes the box. If you take a look at the plans here, and I want to illustrate on these plans. What we had proposed was to put stealth materials in a boxed fashion. Basically to do that -- and these aren't our antennas, but to do that to our antennas. What we've done is we're

replacing the signage here at AT&T's two locations and putting the antennas behind it. And that's the representation you see in the photo simulations. I can't tell if the first photo has the box over on the left-hand side or if it's flush.

TAD HEUER: Yeah, it definitely does. You can see the shadow underneath the box.

ATTORNEY EDWARD PARE: But you'll see if you flip, you'll see that they were taken out.

CONSTANTINE ALEXANDER: I'm sorry, I just don't understand. I'm looking at the photo sims, and I guess it's No. 1. And it says: Proposed new antenna mounted to new mounting pipe mounted behind screen wall. (Inaudible.) What is that screen wall? Is that the Royal Sonesta sign?

ATTORNEY EDWARD PARE: We're going to replace it with fiberglass, part of the

sign with fiberglass, painted to match the sign and then put the antennas behind the fiberglass piece. They can't go behind metal, but they can go behind fiberglass.

CONSTANTINE ALEXANDER: Right.
No, that's why I'm confused.

That white little box there is going to be painted -- that's where it's going to be now, and it's going to be painted to match the color of the sign?

FRANCIS KELLEY: There's permanently up there -- there's metal panels that are painted blue. We're gonna remove the metal panels and put fiberglass panels, and so it's going to be at the same level as the existing sign.

BRENDAN SULLIVAN: Same plane?

FRANCIS KELLEY: It would be on the same plane. It won't look any different.

ATTORNEY EDWARD PARE: Take a look photo 2, that will probably better illustrate

it.

TAD HEUER: And then you just drop the antennas behind that ballast or whatever you want to do?

ATTORNEY EDWARD PARE: Right. And those are reflected here again.

BRENDAN SULLIVAN: Some of the pipes, they're saving from all the other locations.

ATTORNEY EDWARD PARE: The lengthy pipes we're saving.

TIMOTHY HUGHES: You can use all the pipe mounts behind the screen.

ATTORNEY EDWARD PARE: Thank you.

TAD HEUER: Knock yourself out.

BRENDAN SULLIVAN: There's probably three million out there somewhere in some warehouse and that's why they're using them.

ATTORNEY EDWARD PARE: They're already precut I gather.

BRENDAN SULLIVAN: And engineering

is saying we can't do it.

ATTORNEY EDWARD PARE: And the last sector here on the ballast mount we currently have two antennas, and again, we'll be adding a third between the two antennas. But those are as they are currently. And you'll see those depicted from behind in the photo sims.

TAD HEUER: Is there a reason that they have to be ballast-mounted where they can't be pulled into the blue sign, so you could maybe go up a bit of a height and put it behind a screen? Yes? No?

ATTORNEY EDWARD PARE: They're there currently.

FRANCIS KELLEY: Yeah, there's a limited window where you can see it. Where they're in there, it's based on where they are set back from the roof. This sector faces the Charles River. And it's, it's set back from the roof a way, so it has less visibility because of its setback to the roof and it's

hidden behind the sign from different angles on it.

ATTORNEY EDWARD PARE: I will tell you as I testified last time, if we move them back on the roof we do lose signal from shadowing from the roof's edge. Because the signal doesn't catch the phones going straight, it's the leakage down to the phones. If we don't have -- the further back you move them, the higher we gotta go.

TAD HEUER: Right. So here's my question: How much higher do you have to go? Because right now you're flush to the roof, with probably a six-foot ballast mount. So you've got a Royal Sonesta sign that I'm betting is at least, I don't know, eight feet high? You know, if we give you the extra eight feet to go back, probably taller than that, and you mounted them inside where these other antennas are mounted on the edge, I mean, like you said, this is going down to the

Charles River. I don't think anyone -- unless we're really looking to cover our boats on the 4th of July, putting yourself on the edge of that building is kind of immaterial, I would think, to being a bit higher up hidden inside this sign and a couple feet back. I don't know that, that might not be true, but it wouldn't seem out the realm of possibility.

BRENDAN SULLIVAN: Going up and down the Charles and we're going west of the location service area? It's sort of something that has been dropped along the way. It's sort of a -- the service area.

ATTORNEY EDWARD PARE: Correct. It would be towards the -- I don't know whether you're asking whether the view is going to be west?

BRENDAN SULLIVAN: No, I'm just trying to figure out the service area, that's all. So this is the location. So what

you're trying to capture is --

FRANCIS KELLEY: No, it's going this way.

BRENDAN SULLIVAN: And you're going west.

FRANCIS KELLEY: This is shooting this way. This is the sign, and that's up here. And those shoot here and here. And this one shoots back that way.

TAD HEUER: So where does your ballast-mount go?

ATTORNEY EDWARD PARE: It's going over there.

TAD HEUER: Ballast mount goes towards the river, right?

BRENDAN SULLIVAN: Towards the Mass. General?

TAD HEUER: Yes. Well, not even. Mass. General is there. Actually, I'm kind of confused as to where that one goes to. Right? That goes over the river and kind of

into the Charles Street Station and then over into Beacon Hill maybe? Or further down the river towards the Hatch Shell?

BRENDAN SULLIVAN: Well, no the sign is up here. You've got the Mass. General Hospital over here.

ATTORNEY EDWARD PARE: They're shooting in the same direction as this.

TAD HEUER: Really?

ATTORNEY EDWARD PARE: So it's going on in this direction, but it's going to cover 120 degrees.

TAD HEUER: All right.

ATTORNEY EDWARD PARE: These would cover 120 and 120 and so we have 360.

BRENDAN SULLIVAN: Okay.

Tom, any questions at this point?

THOMAS SCOTT: So if ballast mount, those are existing, you have equipment on those?

ATTORNEY EDWARD PARE: Correct.

THOMAS SCOTT: You're just removing it and replacing it?

ATTORNEY EDWARD PARE: We're not removing it.

THOMAS SCOTT: You're just adding it.

ATTORNEY EDWARD PARE: We have two antennas up there.

THOMAS SCOTT: Adding one to that?

ATTORNEY EDWARD PARE: Correct.

FRANCIS KELLEY: AT&T at one point had 12 antennas up on this rooftop. And with the Building Permit back in 2008 --

ATTORNEY EDWARD PARE: For some reason we applied for a Building Permit to reduce the amount of antennas.

FRANCIS KELLEY: We reduced from 12 to what's up there, six.

TAD HEUER: So if I'm looking at photo location 1, can I see the ballast mount on that antenna? Is that the furthest from

the left?

ATTORNEY EDWARD PARE: Photo 1 would be the photo to the left.

TAD HEUER: So that's not the ballast that's sticking up there, right?

ATTORNEY EDWARD PARE: Right. And photo 2 would be furthest to the right.

TAD HEUER: Right.

BRENDAN SULLIVAN: Tim, do you have any questions?

TIMOTHY HUGHES: Not really, thanks.

BRENDAN SULLIVAN: Tad?

TAD HEUER: No. Tell Hudson Design Group that they should -- if they're going to mark the proposed conditions, they should mark all of those conditions. So on photo 1 you kind of lost your money because they should have marked those proposed location of the ballast. What's up with that?

ATTORNEY EDWARD PARE: I wish I had

the answer for you because I would give it to you.

TIMOTHY HUGHES: I would tell you what the answer is but I don't want it to go on the record.

BRENDAN SULLIVAN: Gus? We're all done?

TAD HEUER: Yes. I mean, I like the stealthing. You've done a great job hiding moving the stuff behind the screen. The more of that you can do, the better. It's a great solution. I appreciate the fact that, you know, the bump out probably would have been good, but not great. You went the extra mile and you decided to do a replacement and put it behind.

ATTORNEY EDWARD PARE: It was good, but it wasn't a great idea.

TAD HEUER: I mean, the design you have is probably passable. The one you've is a really nice approach to the location you

have. Understanding what kind of research you can work with, and I like that.

So, again, you're probably saved because you don't really need a photo sim for this building because you're putting stuff behind a wall.

I wouldn't appreciate, and I don't know how we do it in this motion or we just let it go, you know, this notion the ballast mount, given that they do have some additional height to play with, whether that's possible to bring that into the short end of the sign. And to the same thing you've done on the long end, get the ballast mounts out of there. It's not -- I don't know.

FRANCIS KELLEY: If we put a screen wall?

TAD HEUER: Yes, I mean, if I'm looking at --

FRANCIS KELLEY: Our problem is if relocate it, we have lease issues and we have

to deal with the landlord. We could get a screen wall up there and just leave the ballast mount and just put a screen wall up on the sites that are issues. I think it's mostly coming in when you're coming in to Cambridge from the east, you can see it as you're coming in, you can, you have a view.

TAD HEUER: Yes, if you're going over the Longfellow you can see it.

FRANCIS KELLEY: We would be happy to deal with the condition that we put a screen wall from that side to hide it.

TAD HEUER: Yes, I mean, I think here the one we had a couple weeks ago we asked you to put up a kind of fiberglass structure around it. I don't think we want that here, it would be way too high and they're much more prominent. And there you had other kinds of penthouse in the building and that kind of disguised it. And my question is whether you move the ballast mounts -- if I'm looking at

photo location 2, you have these antennas on the short end of the side that aren't yours, right? If you can do something like that on the ballast-mounted end of the sign. So on the -- if I'm looking at the words Royal Sonesta, on the A-N, and bring those ballast mounts out from being ballast mounts into that short end of the sign and putting up the screen, whether you can get -- whether essentially you can stealth those as well, and again --

ATTORNEY EDWARD PARE: Well, first of all, it's hard to tell because I don't know if there are antennas on there already. They're on the R side. You're talking about the A on photo -- just so that I -- because the sign must be the same on both sides.

TAD HEUER: Yes right.

ATTORNEY EDWARD PARE: So, on the R side there are antennas there?

TAD HEUER: Yes, so you've got

antennas here already. Those are pre-existing somebody else's, right?

ATTORNEY EDWARD PARE: Yes.

TAD HEUER: I'm asking if you have ballast mounts here, can you put the ballast mounts there and screen them off?

FRANCIS KELLEY: I don't know.

TAD HEUER: Right.

ATTORNEY EDWARD PARE: I mean, if it's significant, we'll look into it. It delays our program is all I'll say.

BRENDAN SULLIVAN: May be a stretch at this point.

TAD HEUER: That's what I'm here for.

BRENDAN SULLIVAN: You can ask.

Let me make a motion to grant the Special Permit for the location of additional antenna as per the proposal and the drawings contained therein by the Chair.

The Board finds that the requirements

of the Ordinance can be met. In fact, the Board finds that traffic generated or patterns of access or egress would not cause congestion, hazard substantially changed in the established neighborhood.

The Board finds that traffic is not anticipated to increase with the proposal. That the proposed additions that the site is currently visited by technicians, and the addition of these antenna will not increase the traffic to the site.

The Board finds that continued operation of the development of adjacent uses as permitted to the Zoning Ordinance would not be adversely affected by the nature of the proposed use.

The Board finds that the addition of these antenna would enhance the communication of the citizens of the city.

The Board finds that nuisance or hazard would not be created to the detriment,

health, safety or welfare of the occupant of the proposed use, or to the citizens of the city.

The Board finds that the proposed use would not impair the integrity of the district, and the facility will not be inconsistent with the urban design guidelines as set forth in Section 19.30.

The Board finds that the Petitioner has responded to comments by the Planning Board to make the installation as stealth as possible.

On the motion to add also on the condition that should the equipment become not useful, abandoned for a period of more than six months, that the material of the antenna, the equipment, be removed and the facade of the facility be restored to its original location. And that the addition of these antenna be maintained in a good and aesthetically pleasing condition.

Anything else?

CONSTANTINE ALEXANDER: That the appearance of the antenna is consistent with the photo simulations to which were submitted.

BRENDAN SULLIVAN: All those in favor of granting the Special Permit.

(Show of hands.)

BRENDAN SULLIVAN: Five in favor.

(Sullivan, Alexander, Hughes, Heuer, Scott.)

* * * * *

(8:30 p.m.)

(Sitting Members: Brendan Sullivan, Constantine Alexander, Timothy Hughes, Tad Heuer, Thomas Scott.)

BRENDAN SULLIVAN: The Board will hear case No. 10106, 7-9 Crescent Street. Is

anybody here on that matter?

(No Response.)

BRENDAN SULLIVAN: The Board is in receipt of correspondence from Thomas and Eleanor Deegan, 7 Crescent Street.

"To whom it may concern: In connection with ZBA case No. 10106, 7-9 Crescent Street, we write to request that the Board continue this case to its August 25, 2011 hearing date. We have yet to finalize certain design elements and require additional time. We appreciate the Board's patience and look forward to presenting this case later in the summer."

On the condition that the Petitioner sign a waiver to the statutory requirement for a hearing on the decision to be granted thereof, and that the Petitioner change the posting signs to reflect the new date of August 25, 2011 at seven p.m.

All those in favor of accepting the

continuance.

(Show of hands.)

BRENDAN SULLIVAN: Five in favor.

(Sullivan, Alexander, Hughes,
Heuer, Scott.)

* * * * *

(8:30 p.m.)

(Sitting Members: Brendan Sullivan,
Constantine Alexander, Timothy Hughes, Tad
Heuer, Thomas Scott.)

BRENDAN SULLIVAN: The Board will
hear case 10107, 170-170A Fawcett Street.

Counsel, Mr. McQuaid.

KEVIN McQUAID: How are you?

BRENDAN SULLIVAN: Please introduce yourself for the record and please spell your last name.

ATTORNEY NORMAN SHERMAN: I am attorney Norman E. Sherman with offices in Reading, Massachusetts. I appear tonight -- my last name is Sherman S-h-e-r-m-a-n. And I --

CONSTANTINE ALEXANDER:

Mr. Chairman, before we start the case, I need to make a statement for the record. That back many years ago more, than I want to admit, I sat on the Board of Zoning Appeal for the Town of Winchester, and Mr. Sherman at that point was the Zoning Enforcement officer for the Town of Winchester. And about the same time or subsequently Mr. Sherman did a small amount of legal work for me. That was many, many years ago. And except for one

other case, same client about a year or so ago, I've had no contact with Mr. Sherman. I feel like I can sit on this case, but I will recuse myself if any Members of the Board or interested parties would like me to.

BRENDAN SULLIVAN: All your old friends are coming up tonight.

CONSTANTINE ALEXANDER: I know. I'm a famous person.

BRENDAN SULLIVAN: I don't feel you need to do recuse yourself. Do any other Members of the Board find any conflict?

ATTORNEY NORMAN SHERMAN: I might add that was over 30 years ago.

CONSTANTINE ALEXANDER: It was over 30 years ago. I didn't want to say that.

ATTORNEY NORMAN SHERMAN: And neither of us should still be doing this.

BRENDAN SULLIVAN: Mr. Sherman.

ATTORNEY NORMAN SHERMAN: I'm here tonight on behalf of Kevin McQuaid who is the

principal of the Anderson and McQuaid Company at the subject address and also the trustee of the realty trust that's the owner of the subject property.

As Mr. Alexander alluded to, there have been prior cases with your Board, in fact three; 2001, 2003, and 2007. They've all dealt with the same issue in which we're before you tonight. Mr. McQuaid is the operator which was previously -- a company that was previously operated by his father, it's been a family business in Cambridge at the current location in the Fresh Pond area since 1946. He's a specialty hardwood dealer with a very good reputation. And he has -- his family, through thick and through thin, stayed in Cambridge and made a go of it and made a very successful go of it. And he employs a number of Cambridge residents, and has over the years done so. When he could have hired elsewhere more easily.

The matter in which we are here before you tonight, and the matter in which we were before you on three prior occasions, Mr. McQuaid has, since 2001, improved the subject premises by replacing older delapidated wooden, wooden storage facilities with improved and upgraded metal buildings. This one that we're before you on tonight is the fourth, and in all probability, the last of those to be installed. We are -- he's in an Industrial B2 Zone. He is going to be taking down an existing 30-by-60-foot building and replacing it over the footprint of that existing building with a new 70-by-80-foot metal building on a poured concrete slab. It's permitted use in that zone, but he does require a Special Permit. He's under use 437(k) and he does require a Special Permit from your Board pursuant to Section 10.40 of your Zoning Ordinance.

We feel that we comply with all the requirements of the Special Permitting procedure. We would be glad to address any or all of those specifically with you if you would like. We would be glad to entertain any questions you might have as to the proposed construction.

BRENDAN SULLIVAN: As from my understanding, I'm familiar with the site, is that there's two-fold, No. 1, efficiency. And also the removal and the necessity to remove as you alluded to, old delapidated fire hazard buildings.

ATTORNEY NORMAN SHERMAN: That's correct, Mr. Chairman.

BRENDAN SULLIVAN: And that the removal of those, the consolidation of some operations into a metal building, safe building, would enhance the facility for the public I would gather reading through the file.

ATTORNEY NORMAN SHERMAN: That is correct. It would also serve to provide -- it would take over the function served by the existing building. And it would also allow for inside storage of lumber that's presently stored outside on occasion. And as a result of that, it would in fact reduce the truck traffic of deliveries to the area.

BRENDAN SULLIVAN: And the relocation of these buildings, again, from reading the case, and being familiar with the site is that it would allow a better flow of traffic for the general public.

ATTORNEY NORMAN SHERMAN: That is correct also, Mr. Chairman.

BRENDAN SULLIVAN: Which at some times can be challenging.

Any other questions by the Board at this time?

CONSTANTINE ALEXANDER: No.

BRENDAN SULLIVAN: Tad?

TIMOTHY HUGHES: This is an approved use. And we're just extending approved use. Is it because if you demo the building, you lose the Special Permit that goes with the building that we have to do this again?

ATTORNEY NORMAN SHERMAN: I don't believe so. I think it's just that any construction within this zone; new, used, replacement, requires a Special Permit. We're just here to give your Board the authority of review over it.

BRENDAN SULLIVAN: I asked that same question, and the Commissioner said if the existing buildings were taken down for even a day, then they abandon the existing use.

TIMOTHY HUGHES: Okay.

BRENDAN SULLIVAN: And the Special Permit is required. It's -- he said, it's a maybe an outdated, maybe a not a good interpretation, but unfortunately that would

be the interpretation of these buildings.
And obviously they have to be taken down.

TIMOTHY HUGHES: It seems a little
silly.

BRENDAN SULLIVAN: And that the
replacement with new buildings, even though
it's not an exact footprint for footprint,
but it's a consolidation. So anyhow.

TIMOTHY HUGHES: Yes, but we're
really not granting approval or a Variance on
the actual construction. It's just the use
here.

TAD HEUER: It's a Special Permit on
the use.

BRENDAN SULLIVAN: It's a Special
Permit.

TAD HEUER: I would point out that in
reading the transcripts of the previous
cases, the exact same question was asked with
the exact same level of belief by one of the
Board Members.

ATTORNEY NORMAN SHERMAN: I might add that's why I parenthetically said this, with all probability, be our fourth and last appearance before you.

BRENDAN SULLIVAN: This will max it out.

ATTORNEY NORMAN SHERMAN: Yes.

BRENDAN SULLIVAN: Let me open it to public comment. Is there anybody here who wishes to speak on matter at 170-170A Fawcett Street. Please step forward. Give your name and please spell your last name for the record.

GAIL FERRARO: I'm Gail Ferraro. Last name's Ferraro F-e-r-r-a-r-o. I'm an abutter at 180 Fawcett Street. I own the building, and it's occupied about 70 percent of the 23,000 square feet with my gymnastics school. I've been there for eight years, and I was across the street for another eight years.

My parking lot's never been great, but a few years ago I discovered that it was much, much worse. I find out about this this afternoon. So sorry -- this morning. I've had a full long day, and I didn't get to be as polished in my presentation as I would like. I did put in a call to Mr. McQuaid this morning to try and discuss it again.

I realized that a few years ago he put up a building right on my lot, and I do have pictures and I'll share those in a minute, right next to my lot. And about 120 feet long, a long building. And the roof completely pitches into my parking lot. And there's no gutters. And when I -- when the situation was so bad, I was already in the process of doing something with my parking lot, but the engineering department -- I spoke with super of engineering, he came down and he looked at it, and he said that shouldn't have happened. He should have had

to have put gutters on. I called Inspectional Services. I talked with Ranjit at Inspectional Services. He said, that was a mistake on our part. It should never have happened. He said talk to him, call him. This was two years ago. So I did. And he said no, it's not a problem, it can't possibly be. We put a berm up. Well, that berm -- and I've got pictures -- is so close. The roof comes like this. There's about an inch where it could make it if it's a low, straight drizzle. But if it's raining hard, it sweeps straight into my parking lot. And, and that berm only goes as far as this building. So the rest of my parking lot, it just comes right down like a little river. I've got pictures. It goes right around that berm and comes into my parking lot which is a low point.

So I have moms that, you know, it comes up to your knee sometimes it is that bad, the

rain.

BRENDAN SULLIVAN: So facing their location, you're to the left; is that correct?

GAIL FERRARO: Facing my location? I'm to the left, exactly. I'm at the corner of Smith Place and Fawcett Street.

BRENDAN SULLIVAN: Right. That one-story building, is it.

GAIL FERRARO: Actually, I've got three tenants, and it's a two-story in the front. It's actually two-story in a lot of it.

BRENDAN SULLIVAN: Yes, okay.

GAIL FERRARO: Yep, that's my building. And my gymnastics school is in the middle part.

I will show you a picture of his -- that's his structure with the roof that pitches down. That's my building. And I wish I had better pictures to take a look at.

I'm sure you're familiar with it.

For instance, so this is what I was talking about when I said the berm is right there. So in effect it almost like pushes it into my lot. So that's the berm that he said he specifically put without gutters, because this would be good enough. Well, it's not. Here you go.

And here's where it ends. And that picture is -- well, this is -- this was -- this is from the city -- I've got city pictures. They sent me about 20 today of what the work I did and documented. But this is a day after a rain. A day after that's my parking lot. There's no parking. And his berm ends where his building ends. And that looks like this right here. So this is where -- that's the berm, and it just comes right around and just trickles right into my parking lot.

Now, my parking lot, my roof last fall,

I got -- I went ahead and I did storage tanks. I did two-year underground storage tanks. I spent about \$30,000. The city took these pictures, that's them. And then I tied in all of my roof gutters to that. You can see. And that picture there was taken right after. And that was the day after a rain. So, my parking lot does not get all that rain clearly. No one does. It was all coming from next-door. So, these are my new drains. And there's more of a dry weather picture. That's that.

TAD HEUER: What would you like us to do?

GAIL FERRARO: What?

TAD HEUER: What would you like us to do?

GAIL FERRARO: Well, I would like, before he's granted any further -- that he fix what he's done to begin with. I still get rain. And to make it clear that, you know,

I asked him this morning to meet me over there and discuss it. He said, my roof doesn't cause you any problems.

BRENDAN SULLIVAN: Well, the issue before us is in a different siting on the lot. It's not -- they're two different issues, but it's not germane to the issue in the building before us. That being said, however, I think now you've got his attention and I think counsel will acknowledge that the --

ATTORNEY NORMAN SHERMAN: It's a matter worthy of discussion.

BRENDAN SULLIVAN: -- this person has possible standing that there will be a decision rendered if it's a favorable decision, that there is an appeal period. And, again, I'm not giving you legal advice, but there will be, I think, some opportunity to have some discussions. And I think counsel recognizes that and acknowledges that.

ATTORNEY NORMAN SHERMAN: Just to be clear, though, the building -- and we're recently -- and I'm very recently aware of this lady's complaint. What we're talking about, this is at the far left --

BRENDAN SULLIVAN: Right. It's a totally remote section. That's right. And that's why I say the issue before us is not germane to -- we're empathetic to it. But there is a fine line where it's nothing to do with this. But I think that you now got their attention.

GAIL FERRARO: Good, thank you.

CONSTANTINE ALEXANDER: Mr. Chairman, I think you're absolutely correct. I think it would behoove us not to make a final decision on this case until they've had a chance to have some more conversation. I'd like to know what kind of Petitioner we have before us. And I'd like to know how he plans to reach out to his neighbor before I would

make a decision.

I'm concerned that we might have other problems, and not this problem that you brought up, but other problems with regard to instruction.

BRENDAN SULLIVAN: Well, I think -- well, all right, I respect your opinion. I think that what is before us is different than the issue, and I think that the abutter has opportunity and a venue.

CONSTANTINE ALEXANDER: That's an expensive and difficult thing to pursue. And maybe that's the route she would have to go. But I would at least like to have an opportunity for her to have a conversation before she has (inaudible).

ATTORNEY NORMAN SHERMAN:

Mr. Chairman, let me just -- our position, we would be glad to talk to her, to this abutter and try to rectify this issue.

Our position is that this has nothing

to do with the petition before this Board. But as a good neighbor, we'd be more than happy to try to address this. I do want to just add parenthetically, that if anybody who's familiar with that area, that whole area over there has drainage problems, because the whole area is paved over. And there is very, very little proper drainage over there. Mr. McQuaid, in fact, about ten years ago had to spend over \$110,000 to tie into the City's storm drains over there on his property to give him some relief from that. And there are problems over there with drainage. I assume they extend to this lady's property, and to another number of women's and men's property over there that has existed for years and years. They used to just get rid of the standing water by pumping it out into the street. I don't doubt that she has problems similar to or amounting to what she has -- but they are not

caused other than to possibly a very minor degree by Mr. McQuaid's roof, because in fact just before we came here in the torrential downpour that was occurring, I happen, having been alerted to this situation, to go over there and watch the actual conditions on the ground during this rainstorm we had between about five and six-thirty tonight. And that situation complained of was not occurring at that time. But we would be glad to try to resolve this.

BRENDAN SULLIVAN: Tom, what's your thought?

THOMAS SCOTT: Well, given this situation, have those issues been addressed, you know, with this petition tonight? So are there other abutters to this property that may be affected in the same way should we be concerned about, you know, this particular petition and should we be looking at it with a different view relative to that issue?

BRENDAN SULLIVAN: Well, my understanding, and Counsel will correct me if I'm wrong, the location of the proposed building is in a back somewhat corner of the lot and that it is surrounded by its own property, his own other buildings that I think as part of this proposal is that to alleviate the flooding is that the grade is going to change and some drains put in. There was already a huge problem back in here now with water. And so as part of the -- I believe that this proposal is that the, that that level is going to be elevated, the storm drain is going to be put in. So that issue is separate than this issue over here.

ATTORNEY NORMAN SHERMAN: But just to if I may to try to address Mr. Scott's question directly.

TIMOTHY HUGHES: Can I say something here? I mean, we're not talking -- we're not giving a Variance for the construction of a

building. Are we going off on a tangent here? I mean, we're really here just to talk about granting a permit for the use. And then how this gets constructed, it's not on the table for us, the complaint that was raised, and we're not an enforcement body. And I think we're going to waste a lot of time discussing this when it's really not relevant to what's going on before us.

ATTORNEY NORMAN SHERMAN: Let me just to ease the passage of this, just mention that where this building is going to be constructed, two things:

There's an existing building there with a corrugated roof. And everything around it is paved and has been paved for many, many years. There is no way we are increasing any runoff from the existing conditions that are there. No. 1.

No. 2, the drainage system that I made reference to earlier that Mr. McQuaid paid a

substantial sum of money to, one of the main drains was in fact installed, was in fact almost immediately adjacent to where this building is going to be, and has been draining the existing building, the existing paving which was put in approximately ten years ago.

CONSTANTINE ALEXANDER: I withdraw my comments, Mr. Chairman. I think Tim's right.

BRENDAN SULLIVAN: So, anyhow, I think if I can answer your question then, that issue is not a concern.

THOMAS SCOTT: But my point is are there gutters and downspouts on this building? And have they been directed to the appropriate drain system that you've put in? And, you know, why wouldn't you have done that with the other building? So it's -- I know it's not germane and it may be off point --

TAD HEUER: I'm going to point out that it actually is germane. I hate to do

this. But if you look at 10.44, conditions on a Special Permit.

(Reading from Section 10.44.)

And it gives a whole list of, you know, setbacks square otherwise, parking and other kinds of things. With a Special Permit it's a lot -- we have much more leeway than we do with a Variance to impose all kinds of conditions as long as they're nominally related. And the fact that you have multiple buildings on a single lot, we're not, as Tim pointed out, we're not conditioning a building, we're conditioning a use. And if the use is for this entire series of buildings, it actually is within our authority to grant a Special Permit with conditions not relating to this building because we're not talking about a building. We're talking about a use.

BRENDAN SULLIVAN: Right, but I think that our focus has to be on this

particular building. And as Tim pointed out, what is before us is the Special Permit for the use.

TAD HEUER: That doesn't make any sense.

BRENDAN SULLIVAN: Well, that's my -- that's where I'm coming down on that. Any other?

TIMOTHY HUGHES: I don't think we should be focusing on the building at all. We should be focusing on the use. And I think he makes a valid point, that it's the use for the whole site. You can make stipulations. I didn't see that before, but my esteemed colleague makes a valid point. It's the first time I've admitted it.

BRENDAN SULLIVAN: So, how did you want to proceed? Do you want to proceed on this --

TAD HEUER: That was more of a point of information for those who were actually

vested in it than I was.

TIMOTHY HUGHES: I would like to see some attempt made by the petitioner to deal with the concerns here, but I don't think it's in our purview to insist that it happens. I mean, I think we have to decide whether or not the change of use is valid and -- in this instance, the current special permitted use is valid in this situation. And as far as I'm concerned, considering how long this use has been going on on the site, I don't see how we can deny it. And then, what happens between these two people really, the petitioner and the abutter with regards to drainage on the site, is really in the hands of other departments in the city, not us.

BRENDAN SULLIVAN: Well, that's correct.

CONSTANTINE ALEXANDER: I agree.

BRENDAN SULLIVAN: That's correct. So the issue is out there and I think, again,

the petitioner has been made aware of the problem and that the abutter has potential recourse to have those issues addressed is my feeling.

So shall I make a -- anything else to add, delete, change?

ATTORNEY NORMAN SHERMAN: No.

BRENDAN SULLIVAN: Modify?

ATTORNEY NORMAN SHERMAN: No. I think the less said at this stage, the better.

BRENDAN SULLIVAN: Let me make a motion to grant the Special Permit for the use of the proposed to allow storage, a warehouse for processed hard woods at 170-170A Fawcett Street as per the plan, site plan submitted.

The Board finds that the requirements of the Ordinance can be met.

That traffic generated or patterns of access or egress would not cause congestion, hazard or substantial change in the established neighborhood character.

The Board finds that this use has been in existence for well over 50 years.

The Board finds, also, that it is an asset to the trade, and also to the community at large.

The Board finds that continued operations of a development adjacent uses as permitted to the Zoning Ordinance would not be adversely affected by the nature of this proposed use at this location, and that the nuisance or hazard would not be created to the detriment of the health, safety or welfare of the occupant or the proposed use of the citizens of the city.

And that the proposed use does not affect the integrity of the district or adjoining districts otherwise derogating from the intent and purpose of the Ordinance.

All those in favor of granting the relief on this Special Permit.

(Show of hands.)

BRENDAN SULLIVAN: Five in favor.

(Sullivan, Alexander, Hughes,
Heuer, Scott.)

BRENDAN SULLIVAN: And you will have
a conversation with the abutter.

ATTORNEY NORMAN SHERMAN: We will.

Thank you, Mr. Chairman. Thank you,
Members of the Board.

* * * * *

(8:55 p.m.)

(Sitting Members: Brendan Sullivan,
Constantine Alexander, Timothy Hughes, Tad
Heuer, Thomas Scott.)

BRENDAN SULLIVAN: The Board will
hear case No. 10108, 18 Beech Street. If you
would supply a business card for the record.
Please introduce yourself for the record.

ATTORNEY KATIE THOMASON: My name is
Katie Thomason. I'm an attorney at K&L Gates
in Boston. And I'm representing the

Petitioner, the Hope Fellowship Church. To my left is Curtis Cook C-o-o-k. He is the pastor of the church.

BRENDAN SULLIVAN: Before we get into the merits of it, which I know you have a well-prepared statement, but there were some issues that have come to my mind, and I think other Members of the Board probably have some similar issues.

No. 1, you're requesting a Variance to allow the conversion of a two-family home into part religious use and part to remain, I think the second floor, as a residence status.

ATTORNEY KATIE THOMASON: That's correct.

BRENDAN SULLIVAN: You're requesting a Variance from our Zoning Ordinance, but yet you're also claiming some protection under RLUIPA if I have that correct.

ATTORNEY KATIE THOMASON: Yes.

BRENDAN SULLIVAN: And I guess if you're claiming protection under RLUIPA, then how can you be asking for a Variance if you're asking for protection from it. So that is one of my questions.

The other one is have you had any kind of outreach to the neighbors? Because there's considerable concern.

ATTORNEY KATIE THOMASON: We understand. And we have. We had a meeting at the church a few months ago. We've met with the Porter Square Neighborhood Association and the North Cambridge Stabilization Committee. Curtis, I believe, has had full conversations with various neighbors. And I think it ultimately comes down to a difference of opinion.

BRENDAN SULLIVAN: Okay.

For those in the general audience, you

will probably hear some reference to a term which is -- it's a very legal issue. It's RLUIPA R-L-U-I-P-A, which is the Religious Land Use and Institutional Persons Act which was enacted by Congress in the year 2000 which was designed to give protection to religious and institutional uses.

ATTORNEY KATIE THOMASON: Just religious use. Just religious uses.

TAD HEUER: Institutionalized persons.

ATTORNEY KATIE THOMASON: Yes, institutionalized persons. But not, for example, education.

BRENDAN SULLIVAN: Okay. Let me turn it over to Mr. Heuer who has some additional, I think, questions at this point.

TAD HEUER: So my question is really this and this is pre-getting into the merits I hope still.

TIMOTHY HUGHES: I hope so, too.

TAD HEUER: I know you do.

You're here asking for a Variance.

ATTORNEY KATIE THOMASON: Yes.

TAD HEUER: If you're asking for a Variance, you're essentially conceding that the Ordinance applies to you and you're asking for relief from the Ordinance. And that's what we're empowered to do under the Zoning By-Law. We're empowered to grant relief from things that would otherwise apply.

ATTORNEY KATIE THOMASON: Right.

TAD HEUER: In order to get a Variance, you need to show a hardship. And those terms are set forth in the statute as to what a hardship is and they're set forth in the Ordinance as well. And that includes things about the shape, size, topography of the lot, and on other things, right?

If you're asking for a Variance, I wasn't clear in reading your application that

you'd actually pled hardship, because your justification on the form for a Variance indicates that you believe that RLUIPA applies and, therefore, that's your hardship; that you have a hardship coming, not through the terms of the Variance, but through an extrinsic statute.

ATTORNEY KATIE THOMASON: Right. I understand that maybe that's what's confusing on the application, yeah.

TAD HEUER: Well, it seems that that's also in the letter as well.

It seems to me that you're certainly entitled to go ahead with the Variance and attempt to demonstrate hardship to the Board and then we decide yes or no. It seems to me that if you believe that RLUIPA applies, the appropriate course is to go to the Building Commissioner, Inspectional Services, and say, we believe that we are entitled to do what we wish to do under RLUIPA because the

existing Ordinance -- because A, I mean you have to demonstrate that what you're doing is actually religious exercise.

ATTORNEY KATIE THOMASON: Right.

TAD HEUER: You'd have to B, convince them that there's a substantial burden. And then the burden shifts to the City to demonstrate compelling interest. And so it would seem that in the first instance you should be going to the Building Department asking for a determination that you can do what you want to do by-right because RLUIPA supersedes the Ordinance.

ATTORNEY KATIE THOMASON: Right.

TAD HEUER: If they were to say, yes, then the appeal, if any, would come from abutters who believe that the Building Commissioner was wrong.

ATTORNEY KATIE THOMASON: Right.

TAD HEUER: If they were to say no, you would appeal to us in the posture of an

appeal to say the Building Commissioner's determination that RLUIPA does not apply, is incorrect, the Board of Zoning Appeal, make an alternative determination that it actually does apply. That would be what would give us the opportunity to look outside the Ordinance.

Here you're here within the Ordinance essentially. You're asking for a Variance. We can sit in the Variance tonight and go for hardship. I wasn't quite sure that, at least based on the pleadings I see here, and of course you can expand upon them in your oral presentation, that you'd actually -- that it was even responsive to the hardship standards that are set forth in the statute. Because it seems to be talking about RLUIPA instead. I think if you want to raise RLUIPA, you really should be going through the Building Commissioner first and then coming up in a posture of an appeal, rather than mixing and

matching the standards and looking for a Variance essentially trying to get RLUIPA as your basis.

ATTORNEY KATIE THOMASON: Okay.

CONSTANTINE ALEXANDER: If I can just add just a little bit to what Mr. Heuer said. If you want to proceed with a Variance tonight, we can't talk about RLUIPA, in my judgment, because you haven't advertised for it. But look at the people in the audience. Most of them are hearing about RLUIPA for the first time. You have to advertise and let people know what the case is about. And we don't. So, if you want to proceed tonight, it's got to be a strict Chapter 40-A Variance, and you better be able to establish substantial hardship, special circumstances, the whole nine yards.

ATTORNEY KATIE THOMASON: Right.

CONSTANTINE ALEXANDER: But don't talk about RLUIPA.

BRENDAN SULLIVAN: You have to set RLUIPA aside.

TAD HEUER: The other thing I think you still would need to reserve on a Variance in order to be able --

CONSTANTINE ALEXANDER:
Absolutely.

TAD HEUER: -- to be able to meet the Williamson County test. All right? So you would need to be -- I mean, obviously that was a Texas case, but it's been applied to by other courts to the RLUIPA context. I think you need to be able to at least meet Williamson County by exhausting your remedies before the Board so you would know, even if you went above us on appeal, what rights you would have and not have in this property. I think several courts have determined, and Second Circuit's done it I know recently, in 2005 or so, in the New Milford case, that you would need to at least

need to go to some kind of a Williamson analysis with a Variance even if you did go to a building inspector on appeal, you would still at some point need to go through a Variance through us, get it denied or not is more of an exhaustion thing than anything else.

ATTORNEY KATIE THOMASON: Right, right.

TAD HEUER: So I mean, my sense is similar to Mr. Alexander's that I'm not quite sure, and although maybe even a bit more, I'm not sure how you can advertise for RLUIPA. It's not something you put on a Variance application, "I believe I'm here for an RLUIPA finding."

ATTORNEY KATIE THOMASON: Right.

TAD HEUER: I think you get to that posture by going to the Building Department, having them give you an opinion, and then either you appeal if it's adverse to you or

abutters appeal if they feel it's adverse to them.

ATTORNEY KATIE THOMASON: Right.

TAD HEUER: But I'll let you.

ATTORNEY KATIE THOMASON: Right.

Okay, well, let me explain why we're here applying for a Variance first of all.

We actually sent a letter to the City and the Commissioner of Inspectional Services and requested a waiver of the statute. Making the argument that we --

BRENDAN SULLIVAN: You never got a response.

ATTORNEY KATIE THOMASON: We did not get a response. We tried multiple times to get a response. So, this was our, you know, other route which was to say, okay, we'll, you know, apply for a Variance and see how that would go.

BRENDAN SULLIVAN: But, Katie, I guess that was the question, why then did you

not pursue a response? You know, I have the letter. I've read it. I've read it ten times, and I guess my question -- the only overriding question that I had was why would you not have pursued a response to see what your footing was vis-a-vis the city?

ATTORNEY KATIE THOMASON: Right.

BRENDAN SULLIVAN: And then responded to that. Because again, going back to my initial, and I don't want to belabor it, but, you know, you're asking for a Variance but then you were also saying that you're protected by RLUIPA. And to me they're inconsistent. You either -- it's either one or the other.

CONSTANTINE ALEXANDER: Maybe it's the way you phrased it. I didn't see the letter, but you said you requested -- you wrote to the City and requested a waiver of the requirements for the Zoning law. You should be writing to the City and asking for

a determination by Inspectional Services whether RLUIPA applies and, therefore, you're entitled to do what you want to do without regard to our Zoning By-Law. You didn't do it that way.

ATTORNEY KATIE THOMASON: Right.

TAD HEUER: I mean, you could be even more forthright, I believe, and simply go in and apply for a Certificate of Occupancy. Which would force the issue, because they would have to either issue it to you on the basis that you've said that, you know, you don't need to go through this procedure at the Zoning Board because RLUIPA applies and, therefore, I'm entitled to a Certificate of Occupancy as a matter of law.

ATTORNEY KATIE THOMASON: Right.

TAD HEUER: On a determination that you've shown religious exercise for this use and you've shown a substantial burden.

If the City pushes back on you and says

no, you haven't met either of those standards, then you've joined the issue, right?

ATTORNEY KATIE THOMASON: Right.

TAD HEUER: You've created action in the case of your controversy. Here the letter may have been interpreted as just providing, you know, a general informational bulletin to the city which then turns into a Variance here. And, you know, I presume that wasn't your intent.

ATTORNEY KATIE THOMASON: Right.

TAD HEUER: Your intent was to actually get a response from them. If they didn't read it that way, it was probably, you know, lost in the translation. I mean, that would be, that would be my suggestion at least speaking for myself, that you reserve and you continue the Variance request, which I think you will, in either posture you will have to go through unless of course the Building

Commissioner says you're fine as of right, in which case (inaudible).

But to make your first effort to go and ask for a determination or, you know, required determination by seeking a Certificate of Occupancy without going through the Board through a conversion and seeing what you get, at that point I think you'll have the City's position as to whether they believe that you are a religious exercise and whether you do have a substantial burden. And at that point you can, you know, you can go from there and you can come before us on RLUIPA issue. But I think that's the only way you can get to this Board to argue RLUIPA.

ATTORNEY KATIE THOMASON: Right.

TAD HEUER: I think. Unless you have an alternative proposal which I'm happy to hear.

ATTORNEY KATIE THOMASON: No, no.

That makes sense to me. As I said, the reason -- one of the reasons we're applying for a Variance is that we sort of understand that RLUIPA has broader implications than granting a Variance. If we get a court to say that, you know, RLUIPA applies, then it's a bigger problem for the city -- than the city granting us a Variance.

CONSTANTINE ALEXANDER: Sure.

ATTORNEY KATIE THOMASON: So, you know, we are kind of trying to in some ways minimize the --

TAD HEUER: I think if you want to do that, like I said, Mintz seems to go one way in terms of what order they think in an appeal versus a Variance should go. I mean New Milford goes the other way. Personally I don't think it matters in which order they're done as long as you've exhausted through Williamson County and you've done both.

But, my sense is that if you wanted to

proceed on a Variance, what you pled so far in your petition doesn't seem to be the kind of Variance types things that we'd want to see in terms of talking about substantial hardship as to shape, soil, the building, you know, hardship otherwise.

BRENDAN SULLIVAN: It does not address the criteria for 40A.

TAD HEUER: Right. It doesn't do 40A criteria.

My suggestion, if you wanted to go on the Variance alone, unless you're prepared to address those issues in full tonight and have a vote on it, would be to continue this case in order to allow you to present in your written petition those arguments, and then we can decide on the merits. And then if it's adverse to you, if we decide you're not entitled to a Variance, then you could do what we just discussed through the Building Department, and then you would come back to

us in the posture of an appeal if that was necessary.

ATTORNEY KATIE THOMASON: Just give me one second.

TAD HEUER: Sure.

BRENDAN SULLIVAN: If you want you can adjourn to the back room. We can hear another case or two or something. Don't be rushed, that's all, I guess if you want to do that. There's more implications here than should be discussed in 30 seconds I guess.

CURTIS COOK: We have all the people waiting.

TAD HEUER: I mean you have a right to counseling. You can counsel in private if you don't want to have it --

CURTIS COOK: I just don't want to make them wait all night either. You don't know how long the next case is?

BRENDAN SULLIVAN: Let us go to the next case. That's okay. There's a lot at

stake and it should be done correctly.

ATTORNEY KATIE THOMASON: Yes,
thanks.

BRENDAN SULLIVAN: I make a motion
to suspend this portion of the hearing to
allow counsel and petitioner to confer and
we'll join when counsel returns.

On the motion to recess this hearing.

(Show of hands).

BRENDAN SULLIVAN: Five in favor.

(Sullivan, Alexander, Hughes,
Heuer, Scott.)

* * * * *

(9:10 p.m.)

(Sitting Members: Brendan Sullivan,
Constantine Alexander, Timothy Hughes, Tad
Heuer, Thomas Scott.)

BRENDAN SULLIVAN: The Board will
hear case No. 10109, 41 Sacramento Street.

We're just going to give them some time

to confer and to discuss options and then they'll be back. So we'll plow through the next case.

41 Sacramento. If you could please give your name, spell your last name and give your address for the record and tell us what you would like to do.

NANCY O'RIOL: Nancy O'Riol
O-R-I-O-L, 47 Center Street.

Which address do you want?

TAD HEUER: Just an address where we'll be able to find you.

BRENDAN SULLIVAN: As opposed to all the other Nancys out there, that's all.

JACK MORWAY: And I'm Jack Morway. And I'll stick with 41 Sacramento.

BRENDAN SULLIVAN: Okay.

JACK MORWAY: We're not living there at the moment.

BRENDAN SULLIVAN: Yes, I know.

What would you like to do?

JACK MORWAY: Basically we're doing a major renovation of this house. The primary intent is to take it back to what it originally looked like when it was built in the 1850s. And in doing that we wound up removing a substantial portion of the building that was done as a modification in the 1920s. So we took out approximately, I think, 450 square feet of living space. We knocked out a block garage that was attached to it. The problem of course is that the building is where it is, and even after removing the additions that have been put on in the 1920s, the rear wall still sits within the 20-foot rear yard setback. So what we're requesting is that we be allowed to put in basically the same number of windows that are in that building face, which is six, just more symmetrical. Actually, it's somewhat smaller windows. And a porch that would allow us easy access into the backyard we're

going to attempt to turn into a garden.

CONSTANTINE ALEXANDER: Usually when we get plans or elevations or relocation of windows, we see where the windows are now and where the windows are going to be if we grant you relief that you're seeking. I couldn't find that at all in these plans. I mean, I have to also say that these plans are far less than what we usually see for projects that come before us.

JACK MORWAY: Yeah, it's not architecture. I did the drawings.

CONSTANTINE ALEXANDER: Whatever. But the fact of the matter is we need to see that kind of stuff to make an informed decision. I'm having trouble doing that with regard to the window locations.

JACK MORWAY: The only thing I can say on that is, you know, those are the windows that were there. They're kind of all over the place. You want me to generate a

drawing that attempts to say where they are?

BRENDAN SULLIVAN: There is a Special Permit to replace the six windows. So they would be within a setback somewhere.

TIMOTHY HUGHES: Rear yard setback.

CONSTANTINE ALEXANDER: I don't know if we granted relief, Mr. Chairman, whether Mr. Sherman would know how to enforce it or interpret it without some sort of drawings showing where the windows are going to be.

TAD HEUER: Mr. O'Grady?

CONSTANTINE ALEXANDER: I'm sorry?

TAD HEUER: Mr. O'Grady.

CONSTANTINE ALEXANDER:

Mr. O'Grady. Sorry.

TIMOTHY HUGHES: You don't have any elevation at all?

BRENDAN SULLIVAN: There is none. Are you going to replace --

JACK MORWAY: There's no elevation?

BRENDAN SULLIVAN: Are you going to replace the windows in kind? In other words, putting in exactly the same?

JACK MORWAY: No.

BRENDAN SULLIVAN: So you're changing the windows?

JACK MORWAY: You don't have that?

BRENDAN SULLIVAN: Well, we do. But I guess looking at this in bold face, it's -- what we really need is to show what is existing and what is proposed. In other words, a dotted line, red line or something, something superimposed saying this is the existing location, existing size of the windows and these are the proposed. Just so it charts exactly what's going on here.

CONSTANTINE ALEXANDER: Exactly.

BRENDAN SULLIVAN: That's really what it is. So that the when they go to issue the Building Permit, they know what they're issuing the permit on, No. 1.

When the inspector goes out, he basically ties what you're doing to the relief that's being granted. And so the building inspector at some point is going to need to know that. And there's a chart that shows what was existing and what was proposed. That's really the basis of that.

And it's really -- it just needs more clarity for their benefit, for yours so that there is -- we had a case earlier this evening where that was not shown on a drawing and the building inspector picked up that in fact something had been moved in construction and they had to stop. They had to move into this house now, they can't because it was found in violation. You know, and again, it was an oversight. And so consequentially that would have been acquired here to show an elevation. Something showing what the existing windows are, the size of the windows and what is proposed. And Mr. O'Grady can

answer that a little bit clearer for you or show you exactly what we mean by this. So, what I'm hearing is that we would entertain a motion to continue this matter.

CONSTANTINE ALEXANDER:

Mr. Chairman, I think you can consider it as a case not heard, too, because we never got into the merits.

BRENDAN SULLIVAN: Correct.

Continue this matter to allow the petitioner to adequate time to produce drawings, sketches or illustrations showing the existing and proposed work to be done. To enhance the existing drawings that are in the file.

JACK MORWAY: Now, the existing could be problematic. They're not existing, they're falling down.

NANCY O'RIOL: Half of them fell down.

BRENDAN SULLIVAN: Well, do the best

you can with what you've got basically. Just so that again we can sort of chart it.

JACK MORWAY: This is currently what I've got.

BRENDAN SULLIVAN: Well, then that's existing and then show us proposed.

NANCY O'RIOL: Okay.

TAD HEUER: Mr. Chairman, I understand that we agreed to do this way. And I understand why we do it this way.

This house is delapidated and not a very strong word. It's holding on by a thread. I'm not certain that having the previous locations of the windows given the current state of the house and even the state of the house when it was purchased would be very valuable in this particular case. We really want to know where the new windows are going to go. I mean have an indication of that. I'm not sure we want more of an indication in terms of size and distance so there are

measurements on the plan. But it seems to me to be at least in this request, it's a rather minor request. It's a request I guess for a house that's about to fall down. I'm somewhat hesitant to push this out to August for one, windows that are no longer there that no one will care about the previous location, that's just me.

BRENDAN SULLIVAN: I was going to try to get a date from Sean, and I think it could be done somewhat quickly. Is that correct? Just to, again, show us the best you can with what's there and what's proposed, that's all. I'm trying to get a date from Sean.

And I guess to the extent I guess the question is going to be asked since it's in side yard setbacks, you may not get relief on any windows that face the street. Or any windows that would face abutters on your left or right. If you just sort of show them what

you're doing and get their approval.

NANCY O'RIOL: We actually already got approval because they think it's very ugly what's there now. They want the windows actually.

BRENDAN SULLIVAN: Absolutely. So, again, you know, that will come up, have you spoken with them and do you get their approval? And the answer will be in the affirmative.

Sean, as soon as possible.

SEAN O'GRADY: Did you open?

CONSTANTINE ALEXANDER: No.

BRENDAN SULLIVAN: We did not.

SEAN O'GRADY: As soon as possible, July 28th.

BRENDAN SULLIVAN: Okay. You can do that?

Let me make a motion to continue this matter to July 28th as per the previous petitions to allow the petitioner ample time

to provide adequate documents showing, to the extent possible, existing and proposed window locations.

Also on the condition that the petitioner sign a waiver to the statutory requirement for a hearing and a decision to be rendered thereof. Also, that the petitioner change the posting sign to reflect the new date of July 28, 2011 at seven p.m.

CONSTANTINE ALEXANDER: That's very important. Make sure you change, with a magic marker, change the time and date on the sign otherwise we won't be able to hear it on July 28th.

TAD HEUER: Can I ask before we do this, is there anything with the Variance side that should be -- that needs additions, amendments, corrections, so we're not back here having the same conversation in a month.

BRENDAN SULLIVAN: No. I think that part of it is clear, that they are taking

down part of a structure and they are doing a deck. I mean, a porch, whatever you want to call it, a wraparound.

TIMOTHY HUGHES: And the plans are sufficiently detailed?

TAD HEUER: That's my question.

CONSTANTINE ALEXANDER: And I don't think that's --

TIMOTHY HUGHES: Are they properly scaled out so you feel comfortable signing those, Mr. Chairman?

BRENDAN SULLIVAN: No, I've seen that and that's fine.

THOMAS SCOTT: There's a plan that identifies the setbacks and the proximity to the setbacks. Shouldn't we have a site plan that shows that?

JACK MORWAY: You have right there.

BRENDAN SULLIVAN: Yes.

CONSTANTINE ALEXANDER: And this plan only shows what's being removed. Is the

wraparound porch going to be exactly in the same footprint?

JACK MORWAY: Not exactly.

CONSTANTINE ALEXANDER: You've got to --

BRENDAN SULLIVAN: Right here.

CONSTANTINE ALEXANDER: Okay, good. We got it.

TAD HEUER: We can't bifurcate, right? We can't grant the Variance and continue on the Special Permit?

BRENDAN SULLIVAN: I would do them both together.

CONSTANTINE ALEXANDER: I would do both together. Keep them together. Why not?

BRENDAN SULLIVAN: On the motion, then, to continue, all those in favor?

(Show of hands.)

BRENDAN SULLIVAN: Five in favor.

(Sullivan, Alexander, Hughes,

Heuer, Scott.)

CONSTANTINE ALEXANDER: We'll see you on the 28th after you change the signs.

JACK MORWAY: Can I make modifications?

BRENDAN SULLIVAN: Yes.

CONSTANTINE ALEXANDER: You have to get them in into ISD no later than five p.m. on the Monday before the hearing date. You can't bring them to the hearing on the 28th.

SEAN O'GRADY: And I'd like you to add that to that, you can't do anything that doesn't fit under the language of the advertisement.

JACK MORWAY: Yes.

TAD HEUER: You're restricted to doing the porch and windows. You can move the windows out a bit, but don't come for a new front porch or something.

BRENDAN SULLIVAN: Look to Sean. He's got all of the --

TIMOTHY HUGHES: And I will point out that the number of windows that you're asked to replace, it's in your advertisement. So the number six is going to have to be the number. You can change sizes and move them around some, it's going to have to be six windows otherwise you'll have to re-advertise.

* * * * *

(9:25 p.m.)

(Sitting Members: Brendan Sullivan, Constantine Alexander, Timothy Hughes, Tad Heuer, Thomas Scott.)

BRENDAN SULLIVAN: Ms. Thompson.

For the record, let me re-call case No. 10108.

ATTORNEY KATIE THOMASON: Yes, we have conferred. And we've decided to request a continuance.

BRENDAN SULLIVAN: It would be a case not heard.

Sean, what would be the earliest date?

SEAN O'GRADY: July 28th.

BRENDAN SULLIVAN: July 28, 2011. How many at seven p.m.? That's seven p.m.?

SEAN O'GRADY: Yes. Are you asking me how many there are at seven?

BRENDAN SULLIVAN: Yes. How many are?

SEAN O'GRADY: We're at three.

BRENDAN SULLIVAN: Okay.

So, let me make a motion to accept the petitioner's request for a continuance to July 28, 2011 at seven p.m. on the condition that the petitioner sign a waiver to the

statutory requirement for a hearing and a decision to be rendered.

And also that the petitioner change the posting board, sign to reflect the new date of July 28, 2011 and the time of seven p.m.

And that any further submittals, documents, to be in the file by five p.m. on the Monday prior to the hearing of July 28th.

Any other?

CONSTANTINE ALEXANDER: No. But just to be clear, if this is on RLUIPA, that's completely separate. You'll have to pursue that. We're just talking about the Chapter 40A Variance case being continued.

TAD HEUER: So you're here on 40A standards alone.

ATTORNEY KATIE THOMASON: Right.

TAD HEUER: Let's vote on that, but I have one more thing to say afterwards.

BRENDAN SULLIVAN: On the motion then to continue this.

(Show of hands).

BRENDAN SULLIVAN: Five in favor.

(Sullivan, Alexander, Hughes,
Heuer, Scott.)

TAD HEUER: If you do go to the city on a request, either for a CO or for an exemption, having looked at your letter, I would suggest that you cite Mintz, which is a good case for you. It's D. Mass, it's recent.

I would suggest that you also think closely about addressing the Seventh Circuit in Cluv C-l-u-v, the substantial burden.

Second Circuit in Westchester Day on substantial burden. A decision from earlier this week DNY. I think that's DNY, Wesleyan Methodist versus Canisteco.

And in relation to that, Judge Posner's opinion in the Seventh in Petra P-e-t-r-a.

You're probably also going to want to know this, your memo is from November.

There's a new RLUIPA case from Judge Posner in Springfield, Springfield versus Springfield Bishop. That is slightly different facts, but is the second RLUIPA case in D. Mass. So to the extent it's relevant and applicable you may want to address that.

ATTORNEY KATIE THOMASON: Thank you very much.

* * * * *

(9:30 p.m.)

(Sitting Members: Brendan Sullivan, Constantine Alexander, Timothy Hughes, Tad Heuer, Thomas Scott.)

BRENDAN SULLIVAN: The Board will

hear case No. 10110, 173 Coolidge Hill.

Please introduce yourself for the record.

JOHN GATES: My name is John Gates. I'm the owner at 173 Coolidge Hill.

PETER WRIGHT: And my name is Peter Wright and I'm the architect involved.

BRENDAN SULLIVAN: And let me preface the hearing that in reviewing the petition, and also reviewing the previous petition back in 2007, I noticed that your application supporting statements for a Variance are identical. And I guess the thought that occurred to me is that -- well, to be honest with you, I guess maybe the words I'm a little perplexed and maybe a little bit insulted that the same supporting statement for that particular Variance was used for this particular one. And I'm just wondering if you still have six children under the age of ten four years later? I guess that's my only thought.

JOHN GATES: It's possible that by mistake I printed the wrong one, but I did not intend to submit the same supporting statement. So I wrote an entirely new supporting statement. There might have been some of the additional technical language that I left the same. But if you could show those to me, I'd be interested to see that.

CONSTANTINE ALEXANDER: Well, the Chairman's being very kind I think. Frankly, we don't have a supporting statement on behalf of the petition you've brought tonight. All you have is what you gave us in 2007.

JOHN GATES: Okay. I gave my supporting statement to Peter to submit. It's, it is not the same one, so you must have gotten the wrong statement. And I don't know what to say.

PETER WRIGHT: Is this the one?

CONSTANTINE ALEXANDER: Well, I

know what we can say.

JOHN GATES: This is the one that should have been --

PETER WRIGHT: And that's right here.

JOHN GATES: So, this is 2007 and this is a different one, correct?

BRENDAN SULLIVAN: Well, read them.

JOHN GATES: Oh, you're saying that the reasoning is similar. Is that what you mean?

CONSTANTINE ALEXANDER: We don't know.

JOHN GATES: The reasoning is similar or the language is not the same. I'm sorry, I'm confused. Do we have the same language?

CONSTANTINE ALEXANDER: The argument you make in your supporting statement you submitted for this case talks about your need for a master bedroom, and it

talks about the family room.

JOHN GATES: For this case?

CONSTANTINE ALEXANDER: Yes.

JOHN GATES: The wrong one was submitted. So, I don't know how that happened.

CONSTANTINE ALEXANDER: We don't have nothing in our file --

JOHN GATES: I understand.

CONSTANTINE ALEXANDER: -- that gives us the argument for why you need three dormers.

JOHN GATES: Now I understand the problem.

CONSTANTINE ALEXANDER: Okay.

JOHN GATES: I didn't understand when you first introduced it, because I did write a different statement. So, this is -- this is the statement that I submitted which has the language about my kids who are no longer all under 10. I have a 15 year old.

I have three 12-year-olds -- about to be 12-year-olds. A seven-year-old and a five-year-old. So, I'm not sure -- I think if what you're saying is that if the reasoning's the same, that I can address. And in 2007 I took what was an addition to the house that included a garage and two what had originally been intended I think as servants quarters above it, and converted that into a master bedroom and a family room underneath. The family room justified by the size of my family.

This application is to take an existing third floor, which was originally an attic space, which had been converted into living space, but has diving ceilings all around it. And I now with my 12-year-olds, believe it or not, they turn -- they're triplets, they turn 12 on the 13th. So in a couple of days. The largest of them has size 12 shoes. He's five ten and a half. And he's 12-years-old. And

he's already -- you saw, I hope, pictures with my submission of me standing in that space upstairs. I'm six, two. And it's like standing in an attic. It's, you know, there's diving ceilings all around. The nature of -- I'm sorry if I offended you guys in any way by submitting something that might appear on its face to ask for a similar reasoning to apply to this Variance.

However, I also did submit a new statement. And the truth is the reasoning is somewhat similar. They are different projects, but the size of my kids, the size of my family and they're living on this third floor space, it's a hardship.

The other thing that you can see, if you look at my lot, which wasn't mentioned in the first application, and I don't think I mentioned it in the supporting statement, is that I have a lot that's significantly smaller than all of my surrounding neighbors.

If any one of my surrounding neighbors, all of whom I brought letters of support from, if any one of them were here applying for the same thing, they wouldn't be here applying because they wouldn't need a Variance. In other words, I'm 150 square feet over the FAR with this approved. 150 total square feet over the FAR. Every other one of my neighbors has several thousand square feet more in their lot. None of them are opposing this. They're dormers. This is nowhere near a substantial project than what I came before in 2007 and asked for. This is literally dormers underneath the maximum height, not extending out over the roof line. Support of my neighbors. And as I said, you can see from the drawings we've brought --

PETER WRIGHT: Let me just pass these out. This is existing section and proposed section of that attic space.

CONSTANTINE ALEXANDER: Why weren't

these in the file by five o'clock on Monday?

PETER WRIGHT: We -- oh. We -- I apologize for that. I did it much later on after the application. I thought it might be a simple thing to look at.

JOHN GATES: These are the letters from the adjoining neighbors. Here's three.

If I may, I brought a plot plan from Coolidge Hill of all of my surrounding neighbors.

TIMOTHY HUGHES: I'd like to see that.

JOHN GATES: If I may, can I read you the square footage of all my neighbors and mine as well so you can see?

TIMOTHY HUGHES: I'd like to see it if I could, otherwise I can't retain it.

JOHN GATES: Oh, okay, no problem.

BRENDAN SULLIVAN: I guess when you were here four years ago and we gave you relief, I guess why -- well, I thought why

wasn't the need anticipated then and why was the project then not able to satisfy all of your requirements?

JOHN GATES: Well, hindsight's 20/20 respectfully. But my children were all under 10 years old then. None of them were approaching anywhere near the height that they now appear to be. The 15-year-old has 13-and-a-half shoes and he's six two already. I had no way of knowing four years ago that I would have the situation that I have now.

Also, to be honest, at the time the need that felt most pressing was to create a family living space in that house. And the idea that my kids who were living comfortably on that third floor in those bedrooms would ever be bursting out of them, would ever be challenged to use the bathroom because the way the ceiling slopes over the toilet didn't occur to me.

And am I the perfectly reasonable guy? No. I perhaps could have seen it. The truth is it was also a substantial project. It cost quite a bit of money to do that in 2007. And so to apply for more and not be able to complete it, would also have been a mistake. I would have needed to come back at some point and ask for this additional project, because, you know, it would be nice if we could all do everything we wanted whenever we wanted to, but that's not the way the world works.

PETER WRIGHT: It was not our intention, I'm quite sure, to come back again four years later four year ago.

JOHN GATES: Of course. I couldn't have taken that permit four years ago. It was already such a stretch for me to be doing what I was doing.

CONSTANTINE ALEXANDER:
Understood. But I guess the other point is that you could have -- we like to see when we

see -- when we asked for relief, we like to see all the relief. We don't like to get relief now and relief a couple years later.

JOHN GATES: Of course.

CONSTANTINE ALEXANDER: You could have applied for the dormers and not pursued it. At least when we granted relief for the rest of the project, we would have known the dormers are going to come some day perhaps, and we could have taken the whole thing in context.

JOHN GATES: I can understand that. The other thing would be I might have been perceived at the time of being even more -- asking for even more.

CONSTANTINE ALEXANDER: That's exactly why we want to see everything at one time and not see this mommy stuff.

JOHN GATES: Right. But that goes to intention. And quite frankly, you know, you both, I think, said that you were insulted

by this application. Well, I'm insulted by the implication that I might be doing something scheming here.

CONSTANTINE ALEXANDER: Nobody said you're scheming. It's just that -- I don't want to use the word insulting --

JOHN GATES: Do you see the --

CONSTANTINE ALEXANDER: The question is that we expect, when we have a case before us, to see the arguments, the positions and the complete file, so when we review them before the case, and not come here and hear the arguments for the first time. And that's what we're having to do because of an inadvertent mistake, we don't have a supporting statement. We're also not getting drawings that were not in the file as well. So we're catching it little by little on the fly.

JOHN GATES: I apologize.

CONSTANTINE ALEXANDER: Which is

not the way we run the operation. That's it.

JOHN GATES: I apologize. It was a shock to me to sit down to have you react that way. I had no idea that was coming.

PETER WRIGHT: The sketches are more the demonstration than articulating --

CONSTANTINE ALEXANDER: Yes, I understand that. They're not the plans.

PETER WRIGHT: Right.

BRENDAN SULLIVAN: All right. If can just run through exactly what the proposal is.

JOHN GATES: So the proposal would be to add two dormers facing east and south, and one dormer facing north and west. The dormer facing north and west would be in a bathroom space. That is in many ways the most impinged space by the diving roof lines. The shower is such that for someone my height you would have to be kind of right up against the showerhead in order to stand in it the way

it is now. And the toilet you have to be sitting, you can't be standing, which is I suppose for certain people is a hardship.

And then in the other room it is, you know, another case of a finished attic, and we would be adding a dormer in each of the rooms. There are two bedrooms. In each of the bedrooms, we would adding a dormer that would increase the head space in each of the rooms. One of the rooms is quite small. The other room is not as small, but it has still these diving roof line.

PETER WRIGHT: I believe you received these. In the packet there were multiple copies of that and demonstrating the toilet location and also the head height.

CONSTANTINE ALEXANDER: And two questions:

The need for the Variance is you're now over your FAR?

JOHN GATES: That's correct.

CONSTANTINE ALEXANDER: And you're going to go more, but --

JOHN GATES: Yes.

CONSTANTINE ALEXANDER: -- about 0.51 --

JOHN GATES: Yes.

CONSTANTINE ALEXANDER: -- to a 0.53 --

JOHN GATES: Yes.

CONSTANTINE ALEXANDER: -- in a 0.5 zone?

PETER WRIGHT: 180 square feet additional gross.

JOHN GATES: Since the last time I was here, my one neighbor, the Whites who supported this application, sold us a very small sliver of the back of their lot. We had a wall that was imposing on their property line, and Eddie and I came to an arrangement where I paid him a little bit of money and we actually transferred, it's recorded. That

added just slightly to our gross square footage for the lot. So it made this additional amount, again, only 150 square feet over the --

CONSTANTINE ALEXANDER: And the other question is do these dormers comply with the dormer guidelines?

PETER WRIGHT: They -- well, yeah, the guidelines are....

TIMOTHY HUGHES: Tell us how they don't.

PETER WRIGHT: But yes, they -- well, I'll say yes.

CONSTANTINE ALEXANDER: Wait a minute.

TAD HEUER: They don't.

PETER WRIGHT: In what way?

TAD HEUER: They don't. That was a trick question.

PETER WRIGHT: In what way?

TAD HEUER: They run into the side

wall.

TIMOTHY HUGHES: They line up on top of the side wall.

PETER WRIGHT: Oh, the facing wall below for structural reasons, yeah.

TIMOTHY HUGHES: See, I personally don't have a problem with that.

TAD HEUER: But you do concede that it's --

TIMOTHY HUGHES: But it is not according to the guidelines.

PETER WRIGHT: Yeah.

TIMOTHY HUGHES: But this is one guideline I think you're in terms of structure you overlook.

PETER WRIGHT: Right. The building isn't that substantially built. Those joists are actually -- we will be reinforcing them as much as we can, but I took a bit of these resistance when it comes to structure there, of course.

TIMOTHY HUGHES: All right. So, the actual length of dormers?

PETER WRIGHT: The length -- the width -- the length of the dormer is -- I'm sorry, I probably couldn't cite that, exactly, the length. But from where it projects from the existing roof line to the outside wall?

TIMOTHY HUGHES: No.

TAD HEUER: No, no.

TIMOTHY HUGHES: On the face.

PETER WRIGHT: Oh, that's right. Nine foot, six. Nine foot, six and the rear one is 15.

CONSTANTINE ALEXANDER: At 15.

TIMOTHY HUGHES: And they all hit the ridge line below the ridge?

PETER WRIGHT: They come below roughly an elevation --

TIMOTHY HUGHES: So two out of three ain't bad.

PETER WRIGHT: Excuse me?

TIMOTHY HUGHES: Two out of three ain't bad.

PETER WRIGHT: Yeah.

THOMAS SCOTT: Can I talk about three? Because they did not -- he did not interrupt the eave line along the edge of the roof, which I think is what the guideline is trying to prevent from having kind of this tall wall appearance, but take --

PETER WRIGHT: Right, but continuing the gutter, yeah.

TIMOTHY HUGHES: But there is an eave and a gutter and it still breaks it up.

THOMAS SCOTT: Exactly.

TIMOTHY HUGHES: And structurally it makes more sense to line the walls up.

THOMAS SCOTT: It does.

PETER WRIGHT: We set them in as much as we can, three foot, six; three foot, four and three foot, zero. And --

BRENDAN SULLIVAN: Sean, does the guidelines limit 15 feet along one side? Right now we have two dormers that are in toto almost 18 feet.

SEAN O'GRADY: I don't know offhand.

CONSTANTINE ALEXANDER: My recollection is that it's 15 foot per side.

TIMOTHY HUGHES: Let me look at it.

BRENDAN SULLIVAN: In general dormers should not exceed 15 feet for one half of the main roof's length, whichever is shorter. As an option, there's a maximum length may be achieved to a combination of paired dormers. If paired, the combined length should not exceed 15 feet.

TIMOTHY HUGHES: So it's one out of three.

JOHN GATES: Two out of four.
Whoops.

PETER WRIGHT: It would be design-wise, of course, a difficult thing to

make a room out of that dormer that's narrow than that seven foot, you know, trying to get a bed in there and so on. But I'm sorry I didn't cite that.

CONSTANTINE ALEXANDER: Well, I'm a little concerned that you told me, yes, you met the dormer guidelines and now we find twice you don't.

PETER WRIGHT: I'm sorry. I don't only work in Cambridge.

TAD HEUER: We do.

PETER WRIGHT: Yeah, I know.

BRENDAN SULLIVAN: Any other questions?

THOMAS SCOTT: It's interesting that from the front that the two dormers that exceed that limit, they work symmetrically with the facade of the house. So they have one -- I suppose you can have one centralized, but I think it kind of works visually and architecturally. I'm not sure

about the deck in between. What's the purpose of that and is that necessary?

TAD HEUER: Building code.

BRENDAN SULLIVAN: Well, there's a deck between the dormers. Access to it.

THOMAS SCOTT: Why? You have access from inside?

PETER WRIGHT: It's not necessary by getting code, I'm sure. But we thought --

CONSTANTINE ALEXANDER: It's more than architectural.

THOMAS SCOTT: But it's right on the front of the building, too.

CONSTANTINE ALEXANDER: And you're going to have access to the usable. It's not architectural. It's usable space.

PETER WRIGHT: I suppose it is for the front of the building, but it's actually not a very visible part.

JOHN GATES: Yes. If you look at the pictures you can see basically what you

see unless you were down the bottom of Coolidge Hill looking back up, because the side of the house is where it faces the street not the front of the house. If that makes sense.

BRENDAN SULLIVAN: Any other questions at this time? Tim, any?

TIMOTHY HUGHES: I don't have any questions.

JOHN GATES: I was going to say about the size of the other lots. Does anybody have -- I can tell you the sizes of the other lots around me for --

CONSTANTINE ALEXANDER: Personally I don't think it's relevant.

TAD HEUER: It's not. It's about the hardship on your lot, not anyone else's.

JOHN GATES: Yeah, okay.

BRENDAN SULLIVAN: Let me open it to public comment. Is there anybody here who would like to comment on case No. 10110, 173

Coolidge Hill?

(No Response.)

BRENDAN SULLIVAN: I see none.

There is letter in the correspondence dated May 12th. "To whom it may concern: Our neighbors John and Annkatrine Gates recently made us aware of the application to the Board requesting a Variance. The Gates have taken great care of the house, and the improvements they have made have benefitted the character of our neighborhood. In our view, the Gates' plan for adding dormers would make a nice addition to their home and would detract in any way from the aesthetics of our neighborhood." The signed by 170 Coolidge Hill. Do you know that name?

JOHN GATES: Saj and Nicole-Joni.

CONSTANTINE ALEXANDER: Spell it.

JOHN GATES: Oh, sorry. Saj S-a-j.

BRENDAN SULLIVAN: S-a-j.

JOHN GATES: And then Nicole I think

is N-i-c-o-l-e dash Joni J-o-n-i.

BRENDAN SULLIVAN: Okay, great.

And then there is a correspondence from Eddy and Holly White.

"We are writing in support of the Gates' plan for renovation at 173 Coolidge Hill Road. They have shown a copy of an outline of their plans and we are in full support of their abutting neighbors at 133 Coolidge Hill." Signed by Eddy and Holly White.

Correspondence from Anita W. Robby R-o-b-b-y and Edward Hart, 139 Coolidge Hill. "Our neighbors have made us aware of their application, and the adding of the dormers would make a nice addition to the home. And will not detract in any way from the aesthetics of our neighborhood. We are happy to support their request for a Variance."

That's the sum and substance of the correspondence. I will close public

comment.

Anything else to add?

PETER WRIGHT: One little footnote about the three letters, references. They were they are the direct abutters most concerned with this property meaning they are the most adjacent properties.

BRENDAN SULLIVAN: The element that the dormers are happening, well, the two in the front anyhow. As you walk out your front door, you basically look right at Shady Hill. Well, your front yard and then the Shady Hill in front of you.

JOHN GATES: There's a lot between us and Shady Hill. If you go down the driveway, there's a staircase down into the Shady Hill campus.

BRENDAN SULLIVAN: Yes. But you're really sort of at the tail end of the residential district.

JOHN GATES: We are. There's a

house below us, but it's way down around the corner.

BRENDAN SULLIVAN: Yes.

Okay, anything else to add?

JOHN GATES: Well, I apologize.

BRENDAN SULLIVAN: Words of wisdom.

JOHN GATES: I certainly didn't intend insult or offense, that's for sure.

BRENDAN SULLIVAN: I'm nullified in my initial feelings on it. I just thought it was somewhat -- I couldn't understand why somebody would do that I guess is my thought.

JOHN GATES: And to be honest I understand that. Now that you've explained that, I wish I had foreseen it.

BRENDAN SULLIVAN: Tom?

THOMAS SCOTT: I mean, except for the deck on the front, I'm pretty much okay with it. I'm not quite sure what -- I just worry about, you know, the use of the deck. It's right in the front of the house. It

doesn't -- I don't think it adds anything to the design, and I'm not particularly happy with it.

JOHN GATES: The lot where it sits, it's -- the slope goes down and away as you're looking east and south towards the Charles River and the Boston skyline. And it's one of the only houses -- I think maybe the only house on Coolidge Hill that has that drop away and then the view over the Eliot Bridge down the Charles River and the Boston skyline. And I think that was the inspiration for it, was the idea that we would use it. It's not just a, you know, a folly.

BRENDAN SULLIVAN: Gus, what are your thoughts?

CONSTANTINE ALEXANDER: My thoughts. Basically I think in a more perfect world I think I would be in favor. I'm going to abstain. I'm not happy the way this case was brought before us. I'm not

happy about the fact that we didn't get a straight answer on the dormer guidelines. I'm not happy about the fact that you're not complying with the dormer guidelines. I'm not happy about the fact that we're seeing this in two different pieces. I would have liked to have known this was coming when -- and I was on the case the last time around. I don't want to suggest it's bad faith. I want to be very clear about that. There's just too many troubling elements here for me to vote in favor, but I wouldn't vote against it. I'm going to abstain.

BRENDAN SULLIVAN: Tim?

TIMOTHY HUGHES: I think considering what they're asking for now is no different than the percentage above their FAR the last time, and I have never made any bones about how much disregard I have for the dormer guidelines. And in this case I feel the same way. The fact that whoever made up those

guidelines, and it wasn't me, never put their name on it, you know. It's like, you know, some of it makes sense and some of it doesn't. And that's what they are, they are guidelines. And if the design elements require stepping outside of the guidelines or construction, you know, demands that you step outside of the guidelines, then so be it. So I'm in favor of the project.

BRENDAN SULLIVAN: Okay. Tad?

TAD HEUER: I'm kind of torn. So I don't like the dormer guidelines at all. And I think there are problems, but I think they're what we have. And I think I have the same concern that Gus does, is that the dormer guidelines be complied with and maybe it's a gotcha question, maybe it's just a real question. But we find out just looking at the side view, it's clear that it's not in at least one respect. And then finding out that it's not in terms of length. Yes, it's only

within the same FAR as what they had before because they've added land. But, you know, that does tell me that it seems to be a sloppy application in more ways than one. And that doesn't sit well with me.

Also, I mean, the -- when I first read the file, my main thing that jumped out at me was that it was necessary because the property currently lacks a master bedroom. That's a self-imposed hardship because you gave up the master bedroom to get what you got in the first case. So I mean, you turned the master bedroom into a family space which is perhaps necessary.

JOHN GATES: No, it's not. You misread the file.

TAD HEUER: No?

TIMOTHY HUGHES: We read the old letter that was a repeat of the first letter.

JOHN GATES: Right. But we didn't turn a bedroom into a family room. We turned

a garage into a family room.

TAD HEUER: Right.

TIMOTHY HUGHES: And they got their master bedroom the first time around.

JOHN GATES: Above it what was two -- what were intended as maid's quarters, they were turned into a master bedroom. And they had been adjoined to what was the master bedroom so it had become a walk-through room.

TAD HEUER: This is probably the best explanation of why the file has to be complete, because essentially you're asking to make a determination not only on what I read but to disregard what I read. And to regard something I haven't seen in the context of something that exceeds guidelines that we were told complied with, but now they don't. It's a minor request in the grand scheme of things, but nothing right has come out in the last 20 minutes that's given me all hope for confidence in what I'm voting on.

So, substantively I think there's a way for this to get done correctly. I wish there to be a do over almost. I don't know if continuing it helps because all the issues have been hashed out. I just feel really boxed in to making a decision that otherwise would given me little of pause and now gives me a lot of pause.

PETER WRIGHT: May I?

TAD HEUER: Sure.

PETER WRIGHT: I always assumed I made the assumption that the guidelines were such, guidelines. And, and I -- mainly to address the aesthetic control of dormers, because as we all know, we have seen dormers that have appeared throughout the Boston area that you wish they could -- they were unable to do that. So I worked more in trying to make an attractive dormer. Another thing I did not mention, the illustration I had given you on the existing section, I meant to say

this, also, and I apologize, I didn't say it earlier. I didn't realize that it was necessary to say it earlier. But the rooms as they are, barely as Sean would say, it barely makes code for a liveable space in dimensional headroom. It's only seven foot, nine horizontally of any space that's above seven feet or above, which is pretty borderline for a habitable space, habitable bedroom. And the reason I chose -- I suggested taking the dormer all the way to the outside wall, because given the construction, to take it at least, you know, make it a substantial room as much as possible. It's not really a large space really.

TAD HEUER: I mean this goes to the question that I'm going to be a broken record for the Members of the Board, and usually I don't raise it in this context, usually I raise it in the context for one or two family.

The Zoning Ordinance exists to protect the City of Cambridge. It doesn't exist to allow us to exempt people from things they don't like. Those happen when there are hardships. At a certain point expansion of a house above what is required, or limits that are set forth by City Council requires not relief from us, it requires the action of the petitioner to find another house. There's no inherent right or any particular force to ask for an increase in value/usable space to their home simply because they want to stay in it and simply because it would be better than the alternative.

PETER WRIGHT: I understand.

TAD HEUER: I mean, yes, the house may have limited space in the second floor, third floor, whatever we're talking about here. The house, I believe, has pre-existed everyone in this room by a substantial number of years. It was not an unknown condition

when the house was purchased knowing that comfortably or uncomfortably house a certain number of people. On the certain point, there's no obligation of this Board to expand houses to fit the number of people that want to fit in them. We say that's the reason that there are other houses out there for purchase. I'm very troubled by this case.

BRENDAN SULLIVAN: Then the alternative to further expand on your logic, if we are expanding a house to suit a particular need at this time, at some point when the children move on, move out, then now the house has become too big for the two of us. So, where we start.

JOHN GATES: We're talking about dormers, though, we're not talking about an addition. We're talking about raising a roof line so that you can stand inside.

BRENDAN SULLIVAN: Dormers are adding to the house.

JOHN GATES: That's true. I'm just saying in common sense terms and straight face test as lawyers say, we're looking at talking about a dormer. We're not talking about adding an addition.

BRENDAN SULLIVAN: We're talking about three dormers, sir.

JOHN GATES: Sorry for misspeaking, but you know what I mean. We're not asking for additional space on the lot. We're asking for -- to raise the roof a tick, not above the existing roof line, but we're just trying to make a little more room on the third floor. You know, just to put it in common sense terms, not in terms of the law.

BRENDAN SULLIVAN: Well, should I make a motion, then, or did you want to, or are you comfortable to -- what would a redo do? What do you need?

CONSTANTINE ALEXANDER: If I may make a suggestion, Mr. Chairman?

BRENDAN SULLIVAN: Yes.

CONSTANTINE ALEXANDER: One of the things is as you can see, is you're on the fence and you may not get the relief you're seeking tonight. If that happens, you're going to be out for two years. You can't come back unless you bring us totally different drawing. Is there any possibility you want to take some time, like a month or two, and rethink the design and come back with something different, or more polished presentation that might be closer, if not, in compliance with dormer guidelines? That's a thought. I'm not suggesting that to you. But that's one way you can avoid an unfavorable -- potential unfavorable decision tonight. You might want to think about that.

TIMOTHY HUGHES: I don't know. I thought what I heard was that Tad wasn't really having a problem with the dormer

guidelines. He had problems with presentation and the way things went down tonight, and I can understand that. This was an uncomfortable petition at best. You know, no fault of any one particular person.

BRENDAN SULLIVAN: It was done sloppily. And when I read the same petition from an application four years ago and to the one that's before us now, and again, it could be inadvertently done, but it colored the application not well for me. But anyhow.

TIMOTHY HUGHES: I agree with that. And so, in my own thinking I'm just trying to get passed that and just get to the merits of what we're talking about it being a -- is it a small Variance or is it considerable? And as far as I'm concerned, I still think it's modest in its scope and that's why I still would be willing to vote for it. Despite of all the hiccups along the way here.

JOHN GATES: I appreciate that. I

wish I had given more attention to it. I wish it had been better proposed. I wish there hadn't been the mistake with the same language being sent back to you again. Like I said, I wrote a separate piece. It's all, you know, I appreciate what Mr. Hughes is saying. You know, I would pray that you would look to the merits of it. This is, you know, after all my life. It's not just a case we for me, you know.

BRENDAN SULLIVAN: So I make a motion or do you want to go back and have them come back again?

TAD HEUER: It would behoove the petitioners to come back again because I don't think they want me voting. I think -- I might not have a different opinion next time on the merits, but I don't think they want my temperament to be voting right now. Because I think that there is incredible value to the process. That's why we're here. That's why

you just saw a number of people coming down, spending their night to come down to come and listen to another Zoning Petition because they have value, and they believe that what we do is what preserves the value of the Ordinance. Preserves the law that we've all agreed to live by. And if we decide not to do that, it's because the Board here makes an adjudication based on the powers that we've been -- the minor powers that we've been given. And it's because we're supposed to look at what the Ordinance says and whether something is valuable. And people can go back to this application, not last week, last year, but ten years hence and say I know what they're doing. Not just so that Inspectional Services can say this was built correctly, but so we can go back and look at applications and say "What was going on here? What are we doing as a Board? What are doing in terms of the Ordinance?" It's not really

a common sense test. Yes, it's a minor application. It's a minor amount of space, but the same amount of scrutiny and the same amount of effort and the same legal reasoning to listen to every decision that we make. Whether it's one dormer or it's someone who's deciding to subdivide an entire section of Cambridge. And I don't think that the notion of it's just a little bit here, and here's another application, here's something, that wasn't what I meant to put in. All those things that creep and don't add up and to say is something minor, I don't think really addresses the issue in why we're here. We're not here about minor or major. We're here because we're following the law. And I don't see in the application sufficient respect for what's being asked. We're not a rogue Board. I think it would behoove the petitioner to continue to come back with an application that is letter perfect. Every drawing that

you want in there, in there. Every elevation that you want in there, in there. Every elevation that you want in there, in there. Measurements of everything. If something doesn't comply with the guideline, explain why it doesn't comply with the guideline and say why it's relevant. I want a petition that actually has a petition that we're talking about. Because, again, these documents, if we were to sign off on these tonight, go into a file and people go back and look and they say, what are they talking about the master bedroom the second time? What was the Zoning Board doing looking at a petition that was actually the one that was submitted four years ago? That doesn't make sense. Why are they doing that? Are they competent? Are they capable? I think we owe it not only to ourselves, but to the City of Cambridge and to future boards, we're trying to look at our results as being ones that we reached in a

legally viable and legal manner to be able to go back and read that petition and read that file and know what they're seeking.

So like I said, I don't think I would be -- I'm not sure where I would come out on the merits next time, but I want to see a petition that actually would rise to -- I would actually say that this petition doesn't rise to the merits that we would expect, and it's not actually a petition that we could adjudicate on even if we wanted to.

JOHN GATES: I guess that's that.

BRENDAN SULLIVAN: And also I think that the issue of the two dormers being a total of more than 15 feet and the deck between them needs to be re-looked at. You may come back with the same plan and say you've redone it and this is the best you can come up with. That's okay. But I think it needs to be redone, re-looked at --

PETER WRIGHT: Okay.

BRENDAN SULLIVAN: -- the thought of Mr. Scott anyhow.

So I'm hearing a motion to continue this matter until?

SEAN O'GRADY: August 11th.

BRENDAN SULLIVAN: Until August 11, 2011 at seven p.m. as a case heard.

On the condition that the petitioner sign a waiver to the statutory requirement of the hearing and a decision to be rendered thereof. And on the condition that the petitioner change the posting sign to reflect the new date of August 11th and the new time of seven p.m.

All those in favor of continuing this matter?

(Show of hands).

CONSTANTINE ALEXANDER: Just reminder, if you are going to change your plans in any way, you have to get them in the file by five --

JOHN GATES: I understand, yes.

BRENDAN SULLIVAN: By the Monday
prior to the hearing.

PETER WRIGHT: I understand.

(Sullivan, Alexander, Hughes,
Heuer, Scott.)

* * * * *

(10:05 p.m.)

(Sitting Members: Brendan Sullivan,
Constantine Alexander, Timothy Hughes, Tad
Heuer, Thomas Scott.)

BRENDAN SULLIVAN: The Board will
hearing case No. 10111.

BILL DOWLING: Good evening. I am

Bill Dowling, and my wife and I own the property at 2014 Mass. Ave. along with the cooking school, Cambridge School of Culinary Arts.

BRENDAN SULLIVAN: And you would like to?

BILL DOWLING: When we went to ISD to get a permit to build out an additional teaching kitchen, Sean informed us that we needed to see you folks for a parking variance.

BRENDAN SULLIVAN: I'm very familiar as is a very prominent attorney in the city of the culinary arts school, a connoisseur of culinary arts. Do a majority of your students even come by car or require parking at all?

BILL DOWLING: Some do. The professional students. We have two classifications: Professional students and we have recreational students.

The professional students when we orient them are told driving your own car is not just the way to get to school. And those that do, we encourage them to go to the end of the Red Line at Alewife, park there and take the train back to two stops.

BRENDAN SULLIVAN: Yes. And during the day what are the hours of operation of the school?

BILL DOWLING: Well, classes in the morning start at 8:30 on they run through the day until twelve midnight.

BRENDAN SULLIVAN: And the usual number of students?

BILL DOWLING: Each class consists of anywhere from six to ten, sometimes maximum 12 students.

BRENDAN SULLIVAN: And the reason you're doing this bump out again so to expand the kitchen?

BILL DOWLING: Right.

BRENDAN SULLIVAN: Okay. And, Sean, what triggered the requirement for parking?

SEAN O'GRADY: This case is very, very similar to the yoga cases. Because it's a school, one instructional requires six spaces and normally a space like that would be exempt from parking under the small business because they would have been requiring a less than four. It's basically a quirk of the Zoning Ordinance that educational uses can never use that as small business exemption.

BRENDAN SULLIVAN: Okay.

CONSTANTINE ALEXANDER: And this is a Special Permit case, it's not a Variance?

SEAN O'GRADY: Yes.

TAD HEUER: In terms of this just so we have it on the record. How far are you from the Porter Square Red Line station?

BILL DOWLING: Oh, two blocks. Two

long blocks, but two blocks. We're right across from the another contentious site there, the church.

CONSTANTINE ALEXANDER: Don't mention that.

TIMOTHY HUGHES: I thought you meant the Long Funeral Home.

TAD HEUER: And there are busses serving --

BILL DOWLING: Oh, yes.

TAD HEUER: What's the nearest bus stop to --

BILL DOWLING: Right in front of us. Right on that block.

TAD HEUER: Right. And that's both 77 and what else?

BILL DOWLING: I think we mention it in the material. I think there's four bus lines that go directly in front of the school on Mass. Avenue. 77 being probably the most well known.

TAD HEUER: So in terms of access to public transportation, it's one of the best situated sites in the city?

BILL DOWLING: Absolutely. That's why we love the place, you know.

BRENDAN SULLIVAN: Okay. Any other questions by the Board? Let me open it to public comments.

Is anybody here who would like to speak to the matter of 2014 Mass. Avenue?

(No Response.)

BRENDAN SULLIVAN: I see none, and there is no correspondence.

BILL DOWLING: I have one from an abutter.

BRENDAN SULLIVAN: Do you have that?

BILL DOWLING: Yep.

BRENDAN SULLIVAN: The Board is in receipt of correspondence from Thomas Downer D-o-w-n-e-r. "Dear Board Members: My wife and I live at 13 Regent Street, the property

immediately adjacent to the parking area behind Rogue Building (phonetic) that include 2014 Mass. Avenue. We understand that the owner of the building is seeking a Special Permit to reduce the required amount of parking for that property in order to expand the Cambridge School of Culinary Arts. While we generally support the enforcement of parking regulations particularly in our congested neighborhood, we recognize that the parking area for this property is already fully utilized and that no additional parking is really possible. Given that our neighbor makes a good effort to keep the parking area clean and maintained, we support the granting of a Special Permit to reduce the required parking."

That's the sum and substance of the correspondence and I close public comment. Anything else to add?

BILL DOWLING: I don't think so.

Unless you have further questions.

BRENDAN SULLIVAN: I think you covered it all. I think I, as a personal note, that I think that if there was a problem with parking or with this particular establishment, knowing the neighborhood, we would know about it and hear it.

BILL DOWLING: Amen.

BRENDAN SULLIVAN: I have not heard, seen -- I'm very familiar with the school and I have not seen any adverse effect from the operation.

Any comment, Tom? Gus? Tim?

I make a motion to grant the Special Permit for the reduction of the required two parking spaces for the proposed additional to this facility.

The Board finds that the requirements of the Ordinance can be met. That traffic generated or patterns of access or egress would not cause congestion, hazard or

substantial change in established neighborhood character.

Continued operation of or development of adjacent uses as permitted to the Zoning Ordinance would not be adversely affected by the nature of the proposed use.

That there would be not any nuisance or hazard created to the Detriment of the health, safety or welfare of the occupant of the proposed use or to the citizens of the city. And that for further reasons that the proposed use would impair -- that the proposed use would not impair the integrity of the district or adjoining districts or otherwise derogate from the intent and purpose of the Ordinance.

CONSTANTINE ALEXANDER:

Mr. Chairman, we also have to make findings under 6.35.1 so we get it done right.

It says: A Special Permit shall be granted only if the Board determines and

cites evidence in its decision that the lesser amount of parking will not cause excessive congestion, endanger public safety and substantially reduce...blah, blah, blah. And then we get into the fact about the public transportation and the like. So you might want to tick off some of the 6.35.1 criteria.

BRENDAN SULLIVAN: The Board finds that the parking needs for the proposed additional teaching kitchen space will be met by the following ways:

That the MBTA Subway Commuter Rail is located at Porter Square, less than a five minute walk from the Red Line Subway and commuter rail stops.

That there are three bus routes which also stop within a five-minute -- within a five-minute walk from the location.

There is a plenty of metered and off-street parking available to the students of this particular facility. And the

presentation is that the majority of the students do take public transportation.

CONSTANTINE ALEXANDER: I think you got it all.

BRENDAN SULLIVAN: I think that maybe covers it.

All those in favor of granting the relief?

(Show of hands).

BRENDAN SULLIVAN: Five in favor.

BILL DOWLING: Thank you.

(Sullivan, Alexander, Hughes, Heuer, Scott.)

* * * * *

(10:15 p.m.)

(Sitting Members: Brendan Sullivan, Constantine Alexander, Timothy Hughes, Tad Heuer, Thomas Scott.)

BRENDAN SULLIVAN: The Board will hear case No. 10112, 2225 Mass. Avenue.

ATTORNEY JAMES RAFFERTY: Thank

you. Good evening, Mr. Chairman, Members of the Board. For the record, my name is James Rafferty. I'm an attorney with the law office of Adams and Rafferty, located at 130 Bishop Allen Drive, appearing this evening on behalf of the applicant Pemberton Farms. Thomas Saidnawey, owner. And with the exception of the gentleman at the far end and myself, everyone before you is a Saidnawey.

This is Leo Saidnawey, the founder of the Pemberton Farms Market. In operation 55?

UNIDENTIFIED MALE: 81 years.

ATTORNEY JAMES RAFFERTY: 81 years in business in Cambridge. Mark Saidnawey, son of Leo Saidnawey. Tom Saidnawey, other son. Denna Saidnawey, the spouse of Tom Saidnawey. All of whom work night and day and provide Cambridge one of the more delightful retail experiences, the Pemberton Market. And the gentleman to the far end

Preston Richardson, our project architect.

So, Mr. Chairman, I suspect that most Members of the Board are familiar with this use. It's a very prominent and active retail location on Mass. Avenue. The majority of the site is in the Business A2 District.

This case is one that can probably benefit from a little background in history. It has an interesting history. Way, way back, maybe one of the senior Members of the Board might remember it was actually an A&P at this location. And then there was a car dealer.

LEO SAIDNAWEY: It was an A&P. It was a Studebaker agency.

ATTORNEY JAMES RAFFERTY: Right. And it was in a business district, always had a commercial. The Saidnaweyes were operating their business for many years in the corner of Rindge Ave. and Mass. Ave., the Pemberton Market. And somewhere in the mid-nineties

you moved over there

and began a nursery-style operation, selling Christmas trees in the winter and plants and flowers as a tenant. And then the opportunity came to purchase the building. The site had a brick a warehouse-style building in the back that was still there. And there was an application filed for a Walgreens. Walgreens looked at the site and wanted to operate there. There was a lot of neighborhood opposition. In the end rather than get a chain prescription pharmacy, the Saidnaweys stepped up and came up with what, at the time, was a pretty bold concept. They thought they would model somewhat -- I think we can reveal now on a Wilson Farm type operation, although we never like to talk about Wilson Farm because compared to Pemberton Gardens, they're really -- you know, Pemberton's so much better. But grudgingly we would have to say

if one were to look at a predecessor type of use, and you'll find in the earlier decisions there's even a reference to Wilson Farms style.

CONSTANTINE ALEXANDER: Yes, there is.

ATTORNEY JAMES RAFFERTY: That's like representing Dunkin' and talking about Starbucks. We don't do that. But at any rate, that was the history of the case. I wasn't involved in the initial permitting of the building, but notwithstanding the fact that this occupied this prominent stretch in a Business A2 District for which this use was totally allowed, there was also a desire to use the back building necessary for the economics of the project as an office. And that the back building on this site is actually located in the Residence B Zoning District.

It was an abutter to the property who

operated a commercial business called A Mystery Bookstore. And I would say that she was very effective in being able to have conditions that attached to this Variance that I think this Board probably wouldn't find appropriate. I was kind of struck by Mr. Heuer's comment about years to come people will look at our decisions and will say where these people came from. I want to be quick to say that no one here tonight sat on that case, but nonetheless the case -- the decision is right with personal commitments to this abutter, including new windows in here house, parking spaces. Shoveling her sidewalk is a requirement in the Variance. All these things that were negotiated through a private attorney. So private attorneys found their way into the Variance. And largely life co-existed. Pemberton has been a great success there. And a few years ago that abutter moved away, and a new owner

arrived. And the new owner is here tonight. And that new owner is entitled to a whole, what sets forth in the Variance, is also set forth in private contractual agreements for which he said, I don't want any of those things. I don't need those things. Let's just get along as neighbors. So that has brought us to the point where we're here tonight looking for two things:

We're looking to construct an addition to the building, and also ask the Board to modify some conditions. And the conditions fall into two general categories. And they are that within the Business A-2 District certain retail uses that are permitted as of right in the district, are not permitted here by virtue of the condition. And then the second condition involved a limitation, while the retail use is allowed on the ground floor of a portion of the building in the B Zone, there's a limitation of what can be sold

on the ground floor.

So I did include a copy of that decision in the case, but I would say that if we were to speak about the requests around the use first, in page two of that decision, section two in granting relief under 5.35 A-2 to allow for retail use in the back portion of the building, the Board found that the retail use shall be limited to lawn and garden supplies, tools and equipment for sale and rent and parts therefore, outdoor furniture and accessory products used in yards such as statutory and patio blocks. So you could buy a --

TAD HEUER: And so it is.

ATTORNEY JAMES RAFFERTY: What's that?

TAD HEUER: It is now. Is that the reason why all that stuff is in the back room?

ATTORNEY JAMES RAFFERTY: Right. But that restriction -- so as the business is

grown and here we are how many years later?

MARK SAIDNAWEY: Twelve.

TOM SAIDNAWEY: Thirteen.

ATTORNEY JAMES RAFFERTY: Thirteen years. That aspect of the business isn't as prompt. They're just not selling -- the retail food aspect, it's really becoming a quality grocery store. It has a range of products. It has a range of prepared foods. And it's a great resource. But that product isn't particularly moving. So it's kind of funny, you walk to a point in the building and you can buy a soda on one side of this imaginary line. But you couldn't sell the soda on the other side of the line.

It does have restrictions about accessing that, and you have to come in. And there's no request here tonight to change how it's accessed in the fact that people access it through this door, and there's no separate means of access for all that. So, that's

the, that limitation in the rear, with the modification we're seeking, is that the 4.35 A-2 uses that is are otherwise permitted in ongoing in the store, be allowed to occur on the ground floor here as well. And that's the first request for a modification.

The second request involves limitations on what would otherwise be as of right in the Business A-2 District, and there are, there are a few. And they're set forth in page five of the decision. And in that, those limitations are, and the relevant language states: So long as any Variance presently being requested is in effect as to the portion of the premises currently within the Business A-2 Zoning District, there will be no sales of A, lottery products; B, tobacco products; C, non-gardening related print materials such as newspapers, magazines; or D, fresh meats such as beef, lamb, veal, pork or the like.

We figured out years ago that chicken wasn't in here believe it or not. She missed that. So we went and met with Inspectional Services and defined whether chicken is meat or -- but I mean that gives you a sense of the limitations.

TAD HEUER: There's no live chickens, please. We've gone over that already.

ATTORNEY JAMES RAFFERTY: No, no, no live chickens. And in fact the meat isn't fresh. The meat is -- what did you call it?

TOM SAIDNAWEY: It's Cryovacked.

ATTORNEY JAMES RAFFERTY:
Cryovacked.

TAD HEUER: That was my question. So in the meat cooler, is that --

TOM SAIDNAWEY: We don't cut any meat at the store at all.

TAD HEUER: So fresh is determined as in butchery as opposed to just not Spam,

right?

TOM SAIDNAWEY: Right.

ATTORNEY JAMES RAFFERTY: I must confess some of these would give Mr. O'Grady -- he was in grade school when this was passed. But one of my favorites: The percentage of retail sales involving slate and stone and like building materials be limited to a percentage of not over ten percent of gross sales. I don't know that ISD has ever audited the sales here to figure out what percentage of slate was sold. I'm told by Mr. Saidnawey they don't sell slate and stone anymore. They haven't for years.

TIMOTHY HUGHES: I was going to say that's pretty safe staying in the ten percent.

ATTORNEY JAMES RAFFERTY: So we actually haven't asked to change that one because it's irrelevant. It gives you a hint to some of these conditions.

So, it was a negotiation that extended for a very long period of time. I didn't participate in it initially. I always marveled at the fact that was what -- things that were conceded that were as of right which seemed to me to have very little to do with the impact of the office building. In fact, the office building the feeling was and it's proven to be the case, is highly compatible with the residential abutters and the retail use. It's an architect's office. An architectural office for the time during the building was created. They're there during the day, not there during weekends and evenings when the retail activity is at its greatest. They're not there when residents tend to be home. There's never been a complaint about that office use, yet the office use, which was the primary focus of the use variance, has conditions associated with the retail use that could happen as of right.

CONSTANTINE ALEXANDER: I take it these are the only conditions you want waived? The two that you decided on the groupings of the two. What about the hours of operation?

BRENDAN SULLIVAN: Do you have a summation?

ATTORNEY JAMES RAFFERTY: I have it underlined in the two sections of the decision.

CONSTANTINE ALEXANDER: For example, the hours of operation. There are restrictions on the conditions. They're going to continue?

ATTORNEY JAMES RAFFERTY: Well, the hours of operation shall be eight a.m. to nine p.m. but they go to eleven. And I think --

TOM SAIDNAWEY: Now that we have a liquor license, we would like to have flexibility with our hours.

CONSTANTINE ALEXANDER: I want to

make sure that if we're going to waive conditions, let's get them all done now.

BRENDAN SULLIVAN: It's under the purview of the licensing anyhow.

ATTORNEY JAMES RAFFERTY: Exactly, right. So the hours here -- thank you for pointing that out. The hours, the retail use is limited from eight to nine p.m. and eleven p.m. for Thanksgiving to Christmas, and April 15th to May 31st. So I guess you can be open until eleven last month but not this month.

TOM SAIDNAWEY: I know.

CONSTANTINE ALEXANDER: You do your taxes and then you go have a glass of booze.

TIMOTHY HUGHES: What is the 15th to the 31st bit? I don't get that one.

MARK SAIDNAWEY: That's our busy spring gardening season.

ATTORNEY JAMES RAFFERTY: People are billing tulip bulbs at 10:30 at night.

TIMOTHY HUGHES: Someone at the door

between tax time and Memorial Day.

TAD HEUER: Isn't that what you do with your refund?

ATTORNEY JAMES RAFFERTY: Thank you for that suggestion.

There are a whole bunch of other conditions, frankly, that have been complied with. The site conditions and all that. And, you know, the abutter did get her house painted. She did get new triple paned windows. She did get \$25,000 which is set forth in the agreement. And the agreement is ironically made part of this. It's really --

CONSTANTINE ALEXANDER: Mind blowing.

ATTORNEY JAMES RAFFERTY: It's an amazing decision. It ought to be framed.

TAD HEUER: Who is her attorney?

ATTORNEY JAMES RAFFERTY: Her attorney was very effective.

TIMOTHY HUGHES: I'll tell you who it wasn't.

ATTORNEY JAMES RAFFERTY: I suggested I think the statutes around extortion have been modified since this because I don't know how this happened for what's turned out to be really it's a great use.

So the second piece of it is we're asking, because it's a non-conforming structure, we're here to ask for an addition. And Mr. Richardson can show you the addition. The structure is existing to this point now and then it has a greenhouse. The idea is move the greenhouse over, site in a way that it complies with the setback requirements in the district, and then allow for a one-story proposed addition which will allow for the full --

CONSTANTINE ALEXANDER: The consequence of all that is the nursery

operations are going to shrink. You're not going to have as much space for the plants.

MARK SAIDNAWEY: You know, one aspect of our nursery business is trees and shrubs, and the amount of space they take out up there, I'll make it work. I've already -- I'll make it all work. So yes, some merchandise will shrink a little bit. Instead of bringing in 500 rose bushes at once, I'll bring in 100 at a time.

CONSTANTINE ALEXANDER: But you'll still have a substantial nursery?

MARK SAIDNAWEY: Yeah. There are aspects that people come in for that I'm not going to mess with.

TAD HEUER: In the original -- just so we're clear -- in the original dimensional form there was a 20-foot setback, but that's been amended in the form -- in the additional form to a ten foot which would be compliant; is that right?

ATTORNEY JAMES RAFFERTY: Yes, right, right. Under transitional zoning -- I think we, this -- there was a question as to whether -- it really had to do with this building I believe.

TAD HEUER: Okay.

ATTORNEY JAMES RAFFERTY: Which is pre-existing. And whether that was a rear, whether that's a side, because this is a corner.

TAD HEUER: Okay.

ATTORNEY JAMES RAFFERTY: I think that's clearly a side because that's a corner. I've gone back and forth. But we did change that. And we did do a slight amendment on that.

BRENDAN SULLIVAN: What are the specific violations that bring you here? It's a non-conforming building.

ATTORNEY JAMES RAFFERTY: Right. So I would say that it's probably -- we're

within the GFA. It's probably the Article 8 restriction on a percentage limitation since the building first became non-conforming. And this is a single building. So this building became non-conforming probably when Zoning was adopted, this back building. And since we renovated that, that non-conformity spills over.

BRENDAN SULLIVAN: So the whole thing gets put together?

ATTORNEY JAMES RAFFERTY: Exactly.

We were very mindful in the siting of this building and this building. This section on Day Street, this is part of the transitional zoning because we're within 50 feet of the Residence B District, we have to meet that setback. So we've also done some averaging on that.

BRENDAN SULLIVAN: And no part of the proposed new addition -- there are two, one in the front and one in the little blip,

the fill-in along the side. Neither one of those contradict any prior agreement as part of the original Variance?

ATTORNEY JAMES RAFFERTY: Well, not in the Variance, but in one of the agreements there was a reference to, as long as the abutter owned her property, and any successor for a 30-year period, that there would be no expansion in the Business A-2 Zone. That's not in the Variance, but it's in one of these agreements. So I want to be clear. So I --

TAD HEUER: Is the agreement incorporated by reference so we wouldn't have to agree to it or no?

ATTORNEY JAMES RAFFERTY: It is.

TAD HEUER: So we should?

ATTORNEY JAMES RAFFERTY: We should, yes. Although if you were to find the file, you can't find the agreement.

CONSTANTINE ALEXANDER: I didn't see it in the file.

ATTORNEY JAMES RAFFERTY: It's not. And I can't find it either.

So the agreement does say, and I have a copy, in that agreement it says: For 30 years -- and I thought you know what, no additional building. Here is the agreement. I hesitate to introduce it.

CONSTANTINE ALEXANDER: That agreement is not part of the Variance that was granted, was it?

ATTORNEY JAMES RAFFERTY: Well, there's a reference in the final motion on this 7490, it refers to a letter dated June 23rd.

CONSTANTINE ALEXANDER: June 23rd modified by one June 25th or 27th or something like that.

ATTORNEY JAMES RAFFERTY: So maybe -- this says agreement. It doesn't say letter.

CONSTANTINE ALEXANDER: No. If you

look through the files, there is a second letter. So I don't think that agreement is referenced in either there.

ATTORNEY JAMES RAFFERTY: That's fine. Right. I didn't see it. So thank you. Mr. Sullivan's -- because I was looking at this and thinking do I need to bring this to the Board's attention?

CONSTANTINE ALEXANDER: I mean, the agreement, whoever has rights under that agreement to enforce it can still enforce it.

ATTORNEY JAMES RAFFERTY: Right. Fortunately we've worked that out with the abutter.

CONSTANTINE ALEXANDER: It doesn't concern us from the Zoning point of view.

ATTORNEY JAMES RAFFERTY: Okay, fine.

BRENDAN SULLIVAN: Any other questions?

Tom, any?

THOMAS SCOTT: Not now.

BRENDAN SULLIVAN: Gus?

CONSTANTINE ALEXANDER: No.

BRENDAN SULLIVAN: Tim, any questions?

TIMOTHY HUGHES: No.

BRENDAN SULLIVAN: Tad?

Let me open it to public comment. Is there anybody here who would like to comment on the matter 2225 Mass. Avenue.

CHICO SAJOVIC: I'd like to make a statement.

BRENDAN SULLIVAN: Come forward, please, and state your name and spell your last name and address for the record.

ATTORNEY JAMES RAFFERTY: Successor to the abutter.

CHICO SAJOVIC: My name is Chico Sajovic. That's S-a-j-o-v-i-c. I'm the owner with my wife of what used to be the Kate's Mystery Bookstore. And really simply

we're in full support of them using the property as it's to be used.

TIMOTHY HUGHES: Okay.

BRENDAN SULLIVAN: Okay, thank you.

Is there anybody else who would like to speak on the matter?

JOHN HAYES: Hi. My name is John Hayes H-a-y-e-s. I'm the trustee of the Hayes Family Trust which owns both 245 Mass. Ave. and 3-5 Day Street. I'm also a resident of 3 Day Street. Both properties abut the Saidnawey location.

I would like to refer to the Board of Zoning Appeal decision dated July 22, '97 and, Thomas Saidnawey's letter to the Board dated June 25, '97.

The Board incorporated Mr. Saidnawey's own restrictions of no sales of lottery products, tobacco products, non-gardening material such as newspapers, magazines or d, fresh meats such as beef, lamb, veal, pork or

the like.

I believe Mr. Saidnawey's property is still in the two zones. The Zoning has not changed. The property is still under those restrictions. They still apply. They're trying to overrule the conditions of the prior Board. I object to their approval. They've enjoyed the benefit of the Zoning changes and now want to expand and change the deal. They said -- Attorney Rafferty said --

CONSTANTINE ALEXANDER: Can you elaborate why are you opposed to it? I mean, I hear you -- okay. You're going to get to it.

JOHN HAYES: Attorney Rafferty said they're doing -- they were a great success. The changes Mr. Saidnawey proposed would have adversely affected the leasing of my commercial location, which is property zoned next-door on the other side of Day Street.

Moreover the value of my property would also be adversely affected.

Although the property is not currently leased, the Saidnaweys were renting my property as of last month. I do have letters of intent to lease location for convenience store operators. I've promoted the restrictions to my real estate agent and possible tenants. I have one tenant that will not take the location if restrictions are removed. My real estate agent is a business broker because I plan on the locations staying next-door.

Mr. Saidnaway in '97 promoted to location as being a Wilson Farms type of operation. And now it appears he's trying to make it into a liquor store.

The proposed changes are -- with the proposed changes, I do not believe Mr. Saidnaway will keep with its original concept, which was promoted and agreed to in

1997. I do not feel it's fair if he's allowed to expand his business from the property use outside of the commercial zone. I ask that Mr. Saidnawey is not allowed to expand or change the restrictions which he agreed to in the past.

Removing the restrictions would be a hardship on my property which is properly zoned. And this is a copy of the letter from -- you have the -- do I need to submit that or do you have that in the file already? I'll submit it again. That's Mr. Saidnawey's letter and the original. The most noteworthy is the bottom part of the letter. This is the Zoning Board of Appeals.

CONSTANTINE ALEXANDER: We have that.

JOHN HAYES: Thank you.

CONSTANTINE ALEXANDER: We have to -- let me consider a comment or a response.

Thirteen years ago they were going to

start a new business venture here. They had problems with the neighbor. Basically they want to do a commercial use of the property that's along Mass. Ave. at least in a commercial zone. The kinds of things they agreed to at that time are the kinds of things that ordinarily the commercial businesses could do. Sell fresh meat, and not very restrictions on slate and the like. But they had to make an agreement. Not had to, but they decided to make an agreement on these conditions to facilitate getting passed the neighbor's opposition, and they did that. The world changes in 13 years. There's a need and there's really a need to change the nature of the business. They're not going to open a liquor store. Sorry. That operation is a nursery and it's a food store, and it's also now going to have a liquor component, but it's not going to be a liquor store. I appreciate the impact it has on your

property, but I'm not sure that's something that we should take commercial impact or a financial impact, something you should take into consider. What you're trying to do is prevent a competitor so you can rent your space for more money or to rent it at all. That's not what we're here for, the Zoning Board.

I have problems with the reasons you state to deny the relief. See, what I'm hearing is something that's perfectly reasonable 13 years later.

JOHN HAYES: Well, they did promote it as a Wilson's style farm back in '97.

CONSTANTINE ALEXANDER: That's what they did, okay.

JOHN HAYES: Now they're trying to change the deal. They admitted that Walgreens was interested in the location. I agree, I would speculate that Mr. Saidnawey was against the Walgreens going in because it

would compete against his business back then also.

CONSTANTINE ALEXANDER: I don't think the neighbors would agree with you on that. There was a tremendous neighborhood opposition to the notion of a big chain store with the traffic on Massachusetts Avenue. And what has resulted is something that benefits North Cambridge to a great extent. It's much more consistent with the neighborhood character. It's a service the neighborhood needs, and now they just want to evolve it to the next stage.

JOHN HAYES: Now, you also said that you don't see it being a liquor store. I don't know with the waiver of these restrictions, I don't know what's going to happen.

CONSTANTINE ALEXANDER: They're going to sell liquor there.

ATTORNEY JAMES RAFFERTY: Can I be

clear? There's nothing in the use -- there was no restriction on the sale of liquor.

CONSTANTINE ALEXANDER: That's true.

ATTORNEY JAMES RAFFERTY: So the issue of liquor isn't part of the application, more to your point.

CONSTANTINE ALEXANDER: Thank you. That's right.

JOHN HAYES: I'd like to add selling lottery tickets and cigarettes would be basically (inaudible).

BRENDAN SULLIVAN: As I read your opposition as one that is trying to stifle competition and not one that has an adverse effect on the neighborhood in general. Which I think the issue that we look towards and not one of stifling competition.

JOHN HAYES: We also have a larger building, goes back, which would be -- it might be an unfair advantage because he can

operate a larger store outside of --

BRENDAN SULLIVAN: Okay, that's competition.

CONSTANTINE ALEXANDER: That's competition.

JOHN HAYES: With the adding amount going into the residential zone, having the ability to have a larger store than anybody else would on Mass. Ave.?

BRENDAN SULLIVAN: Again, that's competition, that's all.

JOHN HAYES: Well, again, I just reiterate that it goes against what the --

BRENDAN SULLIVAN: Let me ask you a question, if they were still renting your premise and they wanted to do this work, would you have the same opposition?

JOHN HAYES: If they were renting it --

BRENDAN SULLIVAN: If they were currently your tenant in the location that

you own and they wanted to do this work in addition, would you be down here opposing them?

JOHN HAYES: I wouldn't want that. I wouldn't want another --

BRENDAN SULLIVAN: Well, you say yes or no?

JOHN HAYES: No.

BRENDAN SULLIVAN: You would not be opposing?

JOHN HAYES: No, no, I'm sorry. I would oppose it.

BRENDAN SULLIVAN: You would oppose this work that they wanted to do if they were still occupying your building?

JOHN HAYES: Not so much the work, the -- less they got the removal of the restrictions is my major part. Of the lottery tickets and the cigarettes are basically -- those are the restrictions that I don't want basically removed.

CONSTANTINE ALEXANDER: Okay.

BRENDAN SULLIVAN: Anybody else wishes to speak on the matter?

DENISE JILLSON: Good evening.
Denise Jillson 2203 Mass. Ave.

I'm an abutter to the abutter. So I'm here in favor of my good friends and neighbors Saidnaweys. And I'm so delighted to finally have an opportunity to say publicly that what happened 13 years ago was nothing short of extortion and absolute blackmail. And for 13 years they've put up with those restrictions on their ability to do their business, and that has been a hardship. And, you know, I take just great pride in being able to say that my husband and I feel supportive of this petition. Tom and Mark have been great neighbors, and they do so much for the community. They give to the community and, you know, the whole experience of being at Pemberton, and I'm very selfish

because sometimes I'm in the middle of a recipe and I need a pepper or an onion, and I can get that in 30 seconds. It's amazing. So there's really a selfish component, too. But it's just so great to have that resource. And it's nice to have Chico as a neighbor now. And there's just a such great community and such a great neighborhood and it's delightful.

CONSTANTINE ALEXANDER: I thought you were going to say you were in support because it's going to help business in Harvard Square.

TAD HEUER: Yes, that's what I thought, too.

ATTORNEY JAMES RAFFERTY: She has another life.

TIMOTHY HUGHES: Private citizen tonight?

DENISE JILLSON: Yes, private citizen tonight. And you know, in terms of

the previous speaker, I think that we were here not long ago and we talked about how many coffee shops there were in Harvard Square. And you know what, competition's the name of the game. And, you know, we've recently opened up that Starbucks, the third Starbucks. And guess what, at the ribbon cutting there were 18 people waiting in line to get in there for a cup of coffee before it was even open. But anyway, competition is a good thing. We are delighted with this and I hope you will approve it.

Thank you.

BRENDAN SULLIVAN: Thank you.

Is there anybody else who wishes to speak on the matter?

Councillor?

CRAIG KELLY: Thank you, my name is Craig Kelly. I live at (inaudible) Terrace. I'm here in support of the petition. It's a can of worms from way back, and I suspect that

you'll get other cans of worms in the future as we try and wiggle sort of the blunt instrument of Zoning into what seems to make sense, and I don't envy your need to sort of parse these decisions, but this one seems pretty clear to me. It was a really awkward decision years ago. And to the extent that it could be fixed now, I hope that you can do so.

And as far as the Starbucks in Harvard Square goes, it's an amazing Starbucks. And I went there the other day, and it was great.

BRENDAN SULLIVAN: Do you find a need for that type of establishment?

CRAIG KELLY: You know, from the policy standpoint I can't really say.

CONSTANTINE ALEXANDER: It's an inside joke.

BRENDAN SULLIVAN: It pushes this guy over the line.

CRAIG KELLY: I understand the

difficulty in what works and what would work 13 years later and people move. So, I don't envy you for having to make the decision. But I hope you do decide in favor of it. Thank you very much.

BRENDAN SULLIVAN: Thank you.

Anybody else wishes to speak on the matter?

ATTORNEY JAMES RAFFERTY: Excuse me, Mr. Saidnawey, I told him he could have two minutes.

BRENDAN SULLIVAN: He can have the last word.

ATTORNEY JAMES RAFFERTY: Oh, okay.

BRENDAN SULLIVAN: There was correspondence in the file from Charles and Michelle Rinaldo, 2200 Mass. Avenue. "I support Pemberton Farms and Tom Saidnawey's current petition, reference number above. As an abutter to Pemberton Farms, I'm in favor of having the current restrictions removed

allowing Pemberton Farms to perform their great business. Please vote in favor of the petition."

There is a letter from Richard Cleary, North Cambridge Stabilization Committee.

"I like to report that at a meeting of the stabilization association last night, it was voted unanimously to support this waiver request. The petitioner has received substantial support from the neighborhood as a result of its long and distinguished history of business achievement and good citizenship." Signed Richard Cleary.

And from Key Funeral Homes by Charles Keefe. "It is with great enthusiasm that I write today to support the efforts of Pemberton Farms and the Saidnaway family to expand their location 2225 Mass. Avenue. I have known and been neighbors with Pemberton and the Saidnaways for many, many years. Please accept as a wholehearted endorsement

of their request to move forward and to grow their business."

A letter of support from Hong Liu. H-o-n-g L-i-u. "To whom it may concern: Being an abutter at 2218 Mass. Avenue, I am in full support of Pemberton Farms' petition before the BZA."

And that's the sum and substance and the final word from Mr. Leo.

LEO SAIDNAWEY: I was just curious why didn't all those restrictions go when Kate went? That's what my understanding was.

MARK SAIDNAWEY: Dad, dad.

ATTORNEY JAMES RAFFERTY: Say how much you've enjoyed being in business.

BRENDAN SULLIVAN: Mr. Saidnawey, I can say, that's a mystery.

LEO SAIDNAWEY: I really thought they'd go away then.

MARK SAIDNAWEY: Dad.

BRENDAN SULLIVAN: I'll close public comment, and Mr. Rafferty.

ATTORNEY JAMES RAFFERTY: I would not use up any more time. With all due respect to Mr. Hayes, I think his concern is clearly based on providing a competitive advantage.

The buildings that abut him to his immediate left, any one of them could become a convenience store. Throw in a lottery machine and it's used to sell cigarettes. That can take place up and down the entire length of Mass. Avenue. So this building had that restriction for reasons I'm not even sure about, but to simply allow a permitted use to occur in this commercial district, I don't -- to prevent it would -- well, the Board said it far better than I so I'll stop talking.

TAD HEUER: Where does that, just for my own edification. Where is the line?

ATTORNEY JAMES RAFFERTY: 100 feet
in.

Preston, you know where it is. Does it
show it on your plan?

PRESTON RICHARDSON: Well,
essentially at the property line.

TAD HEUER: All right. So like it
runs like through the deli counter?

MARK SAIDNAWEY: The residential
zone?

PRESTON RICHARDSON: Well, no, it's
behind that now.

TOM SAIDNAWEY: It's the ramp up.

TAD HEUER: Oh, it's the ramp up.

TOM SAIDNAWEY: Top of the ramp
where it transitions.

DENNA SAIDNAWEY: There's cards
there now.

TAD HEUER: So it runs through the
meat?

TOM SAIDNAWEY: No.

TAD HEUER: The meat freezer?

TOM SAIDNAWEY: Beyond the freezer.

MARK SAIDNAWEY: Right where the
dog food starts if you know the
store.

TAD HEUER: Oh, oh, okay. I don't
know why that makes it more useful but, yes,
it does.

ATTORNEY JAMES RAFFERTY: That is
not objected to.

TAD HEUER: I got it. That was
okay?

ATTORNEY JAMES RAFFERTY: We didn't
have an objection to dog food.

TAD HEUER: All right.

BRENDAN SULLIVAN: Tom, any
questions or concerns?

THOMAS SCOTT: Just looking at that
plan it doesn't seem like it matches the plan
that's -- or am I wrong?

BRENDAN SULLIVAN: Well, it does in

that this is one component. And the other one is a little in-fill.

PRESTON RICHARDSON: The only difference here is that I asked them to --

TAD HEUER: What's the purpose of the in-fill, was that just to straighten out?

ATTORNEY JAMES RAFFERTY: Yes, I think it was -- you looked at it and there's kind of a -- it steps back there and you thought you could enclose it. Is that fair, that small little change?

PRESTON RICHARDSON: It's 145 feet.

TOM SAIDNAWEY: The purpose of it is to be able to extend our deli.

BRENDAN SULLIVAN: Tim, any questions?

TIMOTHY HUGHES: I'm good with it.

BRENDAN SULLIVAN: Tad?

TAD HEUER: No.

BRENDAN SULLIVAN: Okay. What are we looking for here? We're looking for a

Variance.

CONSTANTINE ALEXANDER: With conditions.

BRENDAN SULLIVAN: I make a motion to grant the relief requested to construct a conforming addition to the existing structure and to modify the use restrictions that were issued BZA case No. 7490.

The Board finds that a literal enforcement of the provisions of the Ordinance would involve a substantial hardship to the petitioner because it would preclude the petitioner from operating a full-service fruit and produce market in the building. Right now there is a limitation on the portion of the ground floor for a full range of retail items, and the granting of this relief would allow the petitioner to provide for more goods and services.

The hardship is owing to the existing building to be in a split zone between

Business A-2 and Residence B. And that the existing -- the proposed addition is conforming, however, there was a restriction on the addition in the Residence B Zone. Actually there was a restriction both in the original?

ATTORNEY JAMES RAFFERTY: That's correct, yes.

BRENDAN SULLIVAN: So that the imposition of those restrictions providing a tremendous hardship to the petitioner.

The Board finds that the relief being requested is a fair and reasonable request.

The Board finds that desirable relief may be granted without substantial detriment to the public good and would not nullify or substantially derogate from the intent and purpose of the Ordinance.

The Board waives the following conditions as being -- what's the word I'm looking for?

CONSTANTINE ALEXANDER: The Board would modify.

BRENDAN SULLIVAN: Or modify. I'm sorry.

ATTORNEY JAMES RAFFERTY: Or if I may, the Board might consider extending the relief under 5.35 A-2 that currently exists in the Res B District in the prior decision to extend it by removing the restrictions under 4.35 A2. If you see what they did, they granted -- in the business section of it, they granted four point -- so you could have other retail establishment in the business district with a limitation. And I've underlined the limitation. I'd like to add the hourly limitation as well.

So the Board could essentially grant further relief --

BRENDAN SULLIVAN: Cathy, can you get this down? That the Board is granting relief....

ATTORNEY JAMES RAFFERTY: Under 4.35 A2 to allow for the full retail uses permitted under 4.35 A2 to be exercised on the ground floor of the building in the Residence B District. Thereby removing the limitations set forth on the ground floor in case 7490.

TAD HEUER: Does that --

ATTORNEY JAMES RAFFERTY: No. I mean, that's not all of it. There's another piece.

That then extends the Variance for retail use on the ground floor, extends it in the sense that it removes the limitation.

BRENDAN SULLIVAN: To allow you full use as allowed in 4.32 A2.

ATTORNEY JAMES RAFFERTY: Right. Without limitation as to hours as well.

And then the second piece would be to remove the restriction on retail sales in the Business A-2 District. So that the -- it's

been in those restrictions as set forth in the decision, limit or preclude the sale of -- as set forth on page five I believe.

CONSTANTINE ALEXANDER: Yes, page five.

ATTORNEY JAMES RAFFERTY: I have it highlighted. So, to remove the --

CONSTANTINE ALEXANDER: Remove the restrictions on sales of products as specified on page five, for those restrictions will no longer be in effect.

ATTORNEY JAMES RAFFERTY: Should we identify what they are? There's only a handful.

CONSTANTINE ALEXANDER: It's sort of in the middle.

ATTORNEY JAMES RAFFERTY: It's just the tobacco --

CONSTANTINE ALEXANDER: Yes, that's right. It's lottery tickets -- lottery products, tobacco products, non-gardening

related print material such as newspapers, magazines or fresh meats such as beef, lamb, veal, pork or the like. So those four items which are now prohibited will no longer be prohibited.

ATTORNEY JAMES RAFFERTY: Okay, thank you.

TAD HEUER: And by extension those sales of those items would be allowed in the residential portion?

ATTORNEY JAMES RAFFERTY: Right, because the residential portion, the four point -- we've extended the 4.35 A2 through the entire ground floor of the office building.

TAD HEUER: Right. My question is do you also need to extend 4.35 A1?

ATTORNEY JAMES RAFFERTY: Is that food?

TAD HEUER: No. A2 is other retail establishments.

ATTORNEY JAMES RAFFERTY: Yes, that would be helpful. I don't think they're going to be in that district the way it's currently configured, but in the years to come, who knows.

Mr. Heuer is pointing out that the 4.35 A1 which is the so-called convenient store type of thing, I don't think it would hurt and probably would benefit to include that in the relief in the Residence B portion of the store.

Thank you.

BRENDAN SULLIVAN: So you have that?

And on the further condition that the work be in compliance with the drawings submitted and initialed by the Chair entitled, "Pemberton Market 2225 Mass. Avenue." Prepared by PRA Architects dated 6 June 11 and initialed by the Chair. Any other language?

All those in favor of granting the

relief.

(Show of hands.)

BRENDAN SULLIVAN: Five in favor.

ATTORNEY JAMES RAFFERTY: Thank you
very much.

(Sullivan, Alexander, Hughes,
Heuer, Scott.)

* * * * *

(10:55 p.m.)

(Sitting Members: Brendan Sullivan,
Constantine Alexander, Timothy Hughes, Tad
Heuer, Thomas Scott.)

BRENDAN SULLIVAN: The Board will hear case No. 10113. This is the Special Permit to reduce the required parking by one space. Introduce yourselves for the record.

MACGREGOR FREEMAN: I'm Macgregor Freeman, principal of BTA Architects, Inc., the architect for the project. And this is Norton Remmer code and life safety consultant for the project. And Richard Cohen, which is the managing partner of Brattle Street 52, LLC, which is the ownership trustee.

Are we able to mention both the Variance and the parking as sort of the same breath?

BRENDAN SULLIVAN: Sure. You may have to repeat yourself again. That's okay, fine. We want to tie them all together.

MACGREGOR FREEMAN: If you want to open it for anything to help?

BRENDAN SULLIVAN: Okay. So you want to reduce -- you want to eliminate the parking spot?

MACGREGOR FREEMAN: Right.

There's one -- the business -- the building at 52 Brattle Street is in the Business A Zone, it's bordered on the west by Residence C-2. Residence C-2 around here, and the Business A Zone runs down and it goes down Church Street from there. This -- in the alley so-called on the west side. There's been a -- when the building was built in 1958, there was a loading area which has been -- which has evolved into being a parking space of some privilege. And I was in the building for 38 years as an architect renting space from the client, and we used to get three or four cars in there because we had small cars.

CONSTANTINE ALEXANDER: Very small.

MACGREGOR FREEMAN: But in recent years the alley has become a -- it's much more of a service area. There's an Indian restaurant, Cafe of India is here. This is

Clothing and -- which is retail, and then Setebello retail and then Burdick's Chocolate and Coffee, and that's retail.

When we left the -- we had both floors, second and third floor, BTA Architects did and then Benjamin Thompson Associates. We sublet our third floor to Harvard student agencies for office space, and then when the lease was up, we introduced the idea that Cambridge Center for Adult Ed might be interested in building out classrooms on that third floor. That was in 1996. They liked the idea. They came before this Board and requested Special Permit to eliminate 36 -- 37 parking spaces because of the number of students that they were going to have. So that was approved. The change of uses has been approved, and Harvard University now uses those third floor classrooms, although built out to a different intensity. Same number of people, but different uses.

During the Special Permit process the Cambridge CEAE requested, they required 37 spaces, but they said but ah-ha we have one. And what they did is they enumerate this as one of the 37. So, therefore, they only got granted 36. We didn't realize that when we went into the hearing with you in April. It was pointed out to me that -- I had the document on the decision, but I didn't have the document that went into the request. So it said 36 spaces. I thought that's great. And the restaurant was on the ground floor which has a necessity number of seats requires 18 off-street spaces. That has not been sought or -- and we're not seeking that ourselves. We're just looking for permission to remove this one. It being the only place that's feasible on the whole site, and we have tried for 20 years to do a design that would build an elevator that would make the second and floor accessible. The only

solution that we've come up with, and I can show it on more retail, is that it has to take place on that alleyway.

CONSTANTINE ALEXANDER: Is that parking space used heavily now as a parking space?

MACGREGOR FREEMAN: It's been a single care parking space since -- since we left. We kept our van in it. We left in 2002. Cambridge Center for Adult Ed had classrooms upstairs there. When we left, they took over the space. And for the car that's used for deliveries and things. It was never a public space. Then since that time, Harvard University has had the second and third floor, we've been their architect for improvements on both of those floors. And they have parked -- their pickup truck has been there for a number of years. One of their employees in the facilities department, he has a Harvard off-street space

that he rents. He keeps his truck there to keep the other people from getting in there and using it. Because people use it to kind of stop in and do a few errands and that kind of stuff. So it's been very exposed. It's not a public space, it's a private space. And it's -- the sign CGI Management will tow the car. I've never actually had anybody towed, but as I said, we moved out in 2002. So now it's classroom on the third floor. It's classes that are from nine o'clock in the morning until ten o'clock at night. And we've had an inordinate numbers of local parking spaces.

This distance here is about six minutes' walk for somebody who is looking in windows, and about three minutes' walk for somebody who is in a hurry. That's the site here on this corner. There's ample public parking here. Ample public parking underneath the hotel. Underneath 124 Mount

Auburn Street. Underneath the Charles Hotel. And down here at the -- where the Gulf Station used to be on the conner. That, I can't remember what that's called, but it's called Eliot Street.

The T station at Harvard is here. There's a new entrance to it that's being built here. There are busses, I think probably four routes that go up Mount Auburn Street. Several that go on Garden. It's not a bad walk to go through that to get there. So it's just a place that's chocker block with public transportation. The space is not used for public anyway, and our request is that we be allowed to remove it from the rolls to go forward with the project that would build this, we believe necessary and desirable addition.

The reason it's an addition rather than inside the building, I'll go into it with more detail, just didn't have the space to do it

inside. It's defeated our ability to come up with a solution. And I'll tell you why.

So there are no --

CONSTANTINE ALEXANDER: Let me ask the question now, it will also relate to the elevator shaft. Are there any issues with regard to getting an opinion from the Harvard Square Advisory Committee?

MACGREGOR FREEMAN: None in this case.

CONSTANTINE ALEXANDER: Because?

MACGREGOR FREEMAN: It's a very small project. It's 444 square feet. We've actually, for the record, indicated 426, but we had to make some structural changes that moved it slightly farther away from the existing building. The Harvard Square -- the Planning Board, in the approval, we were questioned on that and spoke to the administrator there, and she either polled the members and found no

interest or decided that it was not within their purview because of its scale even though it's a Special Permit and a Variance.

CONSTANTINE ALEXANDER: I don't think scale has anything to do with it.

MACGREGOR FREEMAN: Yeah. But she -- we received information back from Liza.

CONSTANTINE ALEXANDER: Was that in writing?

MACGREGOR FREEMAN: It was supposed to have gone to the Board.

CONSTANTINE ALEXANDER: I didn't see anything in the file.

BRENDAN SULLIVAN: Well, there's a letter from Liza.

CONSTANTINE ALEXANDER: I don't think it has to do with this.

NORTON REMMER: There wasn't. I spoke with her on vacation. She was on vacation and came back on Wednesday. I sent

her an e-mail on this. And she said no, absolutely not. We don't have to go to the Harvard Square Advisory -- Harvard Square Advisory Square Committee. It doesn't meet the standards and it's been -- if it's been to the Planning Board and they approved it, it doesn't have to go to the advisory committee.

CONSTANTINE ALEXANDER: I'm not sure she's right. But I'm not going to stand on it. I'll take your representation that there's no interest.

BRENDAN SULLIVAN: There was contact --

CONSTANTINE ALEXANDER: There was contact made.

BRENDAN SULLIVAN: -- made and --

NORTON REMMER: Well, I can assure you there was contact made and that was the conversation.

MACGREGOR FREEMAN: But one of the

ones I thought from her regarding that --

NORTON REMMER: She said she would review it and take care of it.

MACGREGOR FREEMAN: She would put into the record.

CONSTANTINE ALEXANDER: I don't think I saw anything in the file, but I don't want to --

NORTON REMMER: She would take care of it.

CONSTANTINE ALEXANDER: I don't think I saw it.

MACGREGOR FREEMAN: We have one here. It's just reams of paper. It's in there somewhere.

BRENDAN SULLIVAN: Okay. On the removal of parking space, Tom, any questions at this point?

THOMAS SCOTT: No.

BRENDAN SULLIVAN: Tim, any questions?

TIMOTHY HUGHES: No.

BRENDAN SULLIVAN: Let me open it up to public comment. Is there anybody here who wishes to comment on case No. 10113, 52 Brattle Street, the removal of the one parking space and the Special Permit to reduce the requirement?

(No Response.)

BRENDAN SULLIVAN: I see none. There is no one in attendance, and there is correspondence from the Cambridge Historical Commission. The Harvard Square Conservation District which indicates that the Cambridge Historical Commission review has been completed. And there is correspondence from the Planning Board which is dated June 8, 2011. The Planning Board Special Permit reiterates the above comments and submits a copy of the decision. It's important of the applicant's request to reduce the required parking by one space.

Reference is to the Special Permit No. 259 which they granted on their meeting on April 12, 2011, and they were in support for the reduction of the parking.

Okay, there's nothing to add, review change modify. Questions, concerns?

I'll make a motion to grant the Special Permit to reduce the required parking by one space.

The Board finds that the requirements of the Ordinance can be met.

That traffic generated or patterns of access or egress would not cause congestion, hazard or substantial change in the established neighborhood character.

The Board finds that the presentation is that the existing space is really in totalitarian in existence. That it is not for use by the public or by any member of the occupant of the building, and is quite undersized at best.

The continued operation of, or development of adjacent uses as permitted in the Zoning Ordinance would not be adversely affected by the nature of the proposed reduction. There would not be any nuisance, hazard created to the detriment of the health, safety or welfare of the occupant or the proposed use for or to the citizens of the city.

And that the proposed reduction would impair the integrity of the district or adjoining districts or otherwise derogate from the intent and purpose of the Ordinance.

All those in favor of granting the Special Permit for the reduction.

(Show of hands).

BRENDAN SULLIVAN: Five in favor.

(Sullivan, Alexander, Hughes,

Heuer, Scott.)

* * * * *

(11:10 p.m.)

(Sitting Members: Brendan Sullivan,
Constantine Alexander, Timothy Hughes, Tad

Heuer, Thomas Scott.)

BRENDAN SULLIVAN: Okay. The Board will hear case No. 10087, which is the variance for the construction of the addition. An accessible entrance at the sidewalk level and the elevator.

TAD HEUER: Just reintroduce yourself for the stenographer.

MACGREGOR FREEMAN: I'm sorry, Macgregor Freeman, BTA Architects, Inc., speaking.

Norton S. Remmer, code consultant. And Richard Cohen managing partner of CGI Management which manages Brattle Street 52, LLC.

Quick rundown of Story Street. This is about a 25,000 square foot building, four stories including basement. Next door is No. 5 Story Street, our immediate abutter. All of those property are owned by the Cambridge Center for Adult Ed and they run

through the block and through the Blacksmith house and studio building through the rear. This is residential apartments. This is residential apartments. This is a large quite -- actually quite old residential apartment building. This is a building that was residential, and actually we have office space in there at one time. And this is a three decker that's been mostly businesses in recent decades.

On the other side of the street is the design research, Crate and Barrel building. All of this is owned by William (inaudible). This is a building owned by Harvard. A building owned by Harvard which used to be the Architect's Collaborative. Both of those, they built them. 14 Story Street was the Dupré Companies, and that was built by Flansbury (phonetic) back in the early seventies. And the post office. So it's a very high density. It's actually in a

different zone of course. This would be -- the Business A Zone kind of sneaks in here. It's a little piece of less intensive development commission.

The building at 52 Brattle Street was built in 1958. It was built at an FAR of 1.375. I'm sorry, 3.75 to one. It was permissible then to be three to one, and it may have been that there were exemptions within it. We haven't attempted to take any gross square footage off. We're assuming it's 25. Whatever it says in the form. The addition adds less than two percent to that. It's 444 square feet. It's actually -- half of it is shaft so there isn't even floor area in two of the floors. The building is eight feet wide -- the addition would be eight feet wide and 19 feet deep. It leaves space behind it for shielding some of the areas of service in the back. The building design, over the last 20 years we've been attempting

different clients. Harvard is one.

Richard Cohen was a client at one time. I'm trying to figure out a way to get an elevator into this building. The existing building is the front lobby, three foot one, six steps up from the sidewalk. There's enough room to get by here, so it's actually an accessible entrance if you can get to here. But you can't get a lift here. You can't get a wheelchair riding lift here. The elevator itself is only 30 inches deep interior measure there, paint to paint. And it gets thinner every time you paint it. And it serves only the first, second and third floor. It doesn't serve the basement. And it's inaccessible from the street. The only way to make it large enough to be accessible is to take this amount of space from this Cafe of India's food service prep area. This is Clothware's area. Ground floors, the basement floors, the service area for both of

them. Second and third floors is office space and classroom space. And it would be very disruptive to try to do this. And even if you do that, you're still three feet above the sidewalk, and it's just not approachable from the sidewalk.

We did several studies. These are isometrics, they're a little hard to read. But they're reading -- looking at the east -- looking at the west wall of the building, we had an idea that you put a lift outside with a roof on it, and that you go in through the side wall which is in through here, here. So that you have a wheelchair lift on the outside. You still require a Zoning Variance to get some sort of structure out there that's not very large. We tried one where you would put a lift inside the front entrance, get rid of those steps, and put the steps outside, so reversing that. That would work a little better for the in and

out of getting to here, but it is a daunting problem to get there. And I don't actually have a picture of it here, but we tried ramps within the loading zone, but there's not enough length in the loading zone to get up 37 inches from the sidewalk level.

So, what we did was we finally just gave up on that as an idea and designed an addition, a minimal addition, leaving alley space to still service the back of the house here. This is a five-foot wide alley between the property line, which is Cambridge Center's property line in the face of the building. It's room for getting a dumpster up the hill and a lot of milk bottles and oil drums for waste for food service. And Burdick and Settebello all come out this way. And also at the end of the alley there's an outside fire escape to the second and third floor, so there's an emergency egress for them as well.

The area -- this actually in the present plans, this store is on the other side for access reasons on the sidewalk, but there's an entry door. This would be motorized for better use by the handicap. You would push a button and have card access because it only goes to Harvard space on the second and third floor. Future tenants would be divided up by floors and have other arrangements. The elevator will accept the size of a gurney as the present code requires. As you go up in the floor, this then tears out. It tears up the elevator structure inside, and that turns into a storage room on the first floor.

The second floor -- at the second floor there's an existing office here, and what we're proposing is the lobby will sit there, there's a new door cut through here. The windows that will be taken out of this wall and put into that wall. And on the third floor it's the same sort of thing. This

happened to be an office that will become a smaller office and have an entrance through here to the common hallway. So it really is a minimal scheme for adding very useful public space and access to the building.

The front elevation, this is the existing stairway, and the front elevation, they'll have an awning that's over both. The doorway into this, they're -- because this is up three feet, it's a little hard to make any kind of cohesive design approach. But our approach right now is to line up things that line up as best we can. And this will be a new entrance. This will be the principal entrance because it's the accessible entrance that will continue to be a pedestrian entrance and an emergency exit, but the signage we'll have to change over as the awning, as I said, will be the same. The height of the building is the same. There's a four-inch setback of this because the

building, because it's brick, it's impossible to match the brick. And we're going to get as close as we can. And this is just a Photo Shopped. This is the actual west elevation as you see it from the street. Although it's all heavily covered with ivy right now. These are gas pipings that go up to the rooftop units. This is the supplier for the Cafe of India and there are other ducts back there for their exhaust air.

This, what we do is take out these three windows and we reinstall them on the new west side. And this is the new entrance, extended awnings, and this is the alley with the new curb cut is five feet wide. It serves back here, and we're purposely I suppose massed out both of that. But the piping and the gas meters will be on the back of the new structure and against the structure in the background and none of that will show up on the face of the building. I know it just

isn't just an aesthetic problem but it's --

CONSTANTINE ALEXANDER: This building non-conforming as to setbacks on that side?

MACGREGOR FREEMAN: No. It's front yard, front yard, side yard, side yard. There's actually no rear yard.

CONSTANTINE ALEXANDER: Okay. I want to be sure you don't need a Special Permit to relocate the windows, that's all.

MACGREGOR FREEMAN: The relocation of the windows is being made into a new addition that's different in use from the existing building. It's -- in other words, these are being covered over by the new addition.

TAD HEUER: I've argued about this for years, and I'm always told that I'm wrong when I say it's a Special Permit is needed.

SEAN O'GRADY: Are you saying that the windows of the addition need their own

Special Permit?

CONSTANTINE ALEXANDER: Yes.

TAD HEUER: Yes.

SEAN O'GRADY: We've always said no. We've always said that that's part of the addition.

CONSTANTINE ALEXANDER: Okay.

MACGREGOR FREEMAN: I'm trying to conserve by using the same windows. The windows actually went in only about ten years ago. So, they're very new. There was Historic Commission approval process for getting the windows. And so that's basically the scope of it.

TAD HEUER: I think I read that you thought about pushing this structure back into the notch area that you have but you can't do that why?

MACGREGOR FREEMAN: Because the actual service zone that's back there.

BRENDAN SULLIVAN: There's too much

stuff back there.

MACGREGOR FREEMAN: There's too much stuff there. And the advantage of having it up here, and the Planning Board agreed with us on this, you really do mask a lot what's there. We're putting a rolling grill for security there so that the dumpster and things can be closed off at night and so people don't come back here and use it as a latrine. We're putting a security gate in the alley that's an emergency exit, but that you need to have a site key to get --

BRENDAN SULLIVAN: You need a certain amount of space to service --

MACGREGOR FREEMAN: Right. It just becomes a service space.

BRENDAN SULLIVAN: Yes, that's right.

MACGREGOR FREEMAN: And --

BRENDAN SULLIVAN: But at least again, like you said, the thought of going in

and out but also waste and coming back out and a new removability in an area that's required.

MACGREGOR FREEMAN: Not having the parking space there, actually, and we've been granted that already so I should shut up. But it's actually not particularly easy to back out of there across that sidewalk knowing whether someone's coming by or not. In other words, this is all foot traffic sort of ramp.

TAD HEUER: So how are you going to access that dumpster? There's enough room to get in to service that dumpster?

MACGREGOR FREEMAN: Yes.

RICHARD COHEN: It will be rolled out.

MACGREGOR FREEMAN: It's two castors usually and it will be going downhill plenty fast and take it up again and it's usually empty.

TAD HEUER: And are you planning on removing the interior elevator or are you keeping that as a second?

MACGREGOR FREEMAN: Oh, sorry I didn't show that.

The first floor -- the elevator actually in the basement level it's -- elevator pit is five feet off the floor. It's a concrete. It was a huge concrete area. So the (inaudible). We're not taking that out of there. We're backfilling the elevator up to the first floor level with the block from the demolition of the elevator. It's all concrete block. So that we don't have to have fluid pressures of trying the backfill concrete or something like that. So basically we're going to put the block all in there.

On the first floor, that would become a storage room. A very strong storage room.

On the second floor, there's where the elevator is. The elevator is this dashed line. And it comes out of there. And the reason we stated in the application that it doesn't increase rentable area is because tenants pay for all of the area within the outside walls. So people are paying for it or not. So what the second floor attendant is going to do is increase the size of the pantry that they have there. The third floor tenant is very similar, and it becomes a store room. It shows the door here, but actually the door is here now. And it's not public, but an open storeroom for supplies and things like that for the maintenance people.

This is classroom. Classrooms on the third floor go all the way around. This is a smaller office, but I'm actually borrowing this office from them now and it's a good size. And the elevator, the very accessible -- the whole flow of space within

this second floor and third floor.

Rooftop. The rooftop is a doghouse with a top. It's -- the existing elevator, that will be removed and it's not visible from anywhere in the public way anyway. And in fact, none of the rooftop equipment is visible from the public way because of intervening buildings. And we have put quite a number of AC units up there over the years.

TAD HEUER: Is the elevator that you are installing, is that a --

MACGREGOR FREEMAN: Hydraulic.

TAD HEUER: -- hydraulic, so you don't have to --

MACGREGOR FREEMAN: This is double jack hydraulic. And it's like a mini hospital elevator. It's very narrow and deep because of the gurney requirement. And it is -- we're bickering over how fast it should go because it's -- you have to add

horsepower.

TAD HEUER: Yes.

MACGREGOR FREEMAN: You have to add horsepower to make it go faster, and, you know, there's limited electrical power to the building. So we're sort of arguing there.

But the elevator -- you'll just go in there and push either 2 or 3. Very simple.

TAD HEUER: And 15 minutes later you'll be on the third floor.

MACGREGOR FREEMAN: Well, 15 minutes you'll get out and walk up. But there are people who spent over the years 40 minutes in the other elevator occasionally. My daughter was one of them.

BRENDAN SULLIVAN: Okay. Let me open it to public comment anyhow. Is there anybody here interested in commenting on case No. 10087, 52 Brattle One Story.

(No Response.)

BRENDAN SULLIVAN: There's no one in

attendance. We are in receipt of correspondence from the Cambridge Historical Commission dated April 27th. The property is located in the Harvard Square Conservation District where exterior alterations are subject to review and the approval of the Historic Commission. After public hearings, the Commission issued a Certificate of Appropriateness and an amendment to the Certificate of Appropriateness for the elevator addition.

Board is in receipt of correspondence from the Planning Board dated April 27, 2011. "The Planning Board reviewed the design of the proposed elevator addition at 52 Brattle Street and One Story Street at its meeting on April 12th. At the meeting, the Board voted to grant a Special Permit No. 259 for setback relief in the Harvard Square Overlay District pursuant to Section 20.54.5 finding that the proposed addition is consistent with the

development of guidelines and the state purposes of the Harvard Overlay District. Additionally the Board recommends in favor of the granting the requested Variances or dimensional relief and for modifications to an existing non-conforming structure."

The Board is in receipt of correspondence from Liza Paden P-a-d-e-n from the Cambridge Community Development Department, informing the Board that under 19.45 a waiver of procedure where a Special Permit issued by the Planning Board is required for a proposed development, no separate, small or large project review procedure shall be required under the provisions of this Section 19.40. She has attached the comments of the Planning Board regarding the reduction.

We go to 19.40 which is the citywide advisory development consultation procedure, under 19.46, the Harvard Square

Overlay District is included in that requirement. However, what Liza is saying in this that where the Special Permit is issued by the Planning Board, that that requirement of the Harvard Square Overlay District Advisory Committee is not necessary.

CONSTANTINE ALEXANDER: I hate to tell Liza that she's wrong. She's dead wrong.

BRENDAN SULLIVAN: That's what her correspondence said.

CONSTANTINE ALEXANDER: She needs to get it right next time.

BRENDAN SULLIVAN: The Board is in receipt of -- I would have thought that they would have gotten it during their review of the application.

CONSTANTINE ALEXANDER: The Zoning Law is quite clear, any Special Permit in the Harvard Square requires and advisory

decision, no exceptions.

BRENDAN SULLIVAN: I would have thought they would have gotten it.

TAD HEUER: As distinct from the Harvard Overlay District. They may have determined this, but they're not --

BRENDAN SULLIVAN: Anyhow. The Board is in receipt of correspondence dated April 28th. "To the Members of the Board of Zoning Appeal; Cambridge Center for Adult Education supports, in general, the addition of an elevator which will provide wheelchair access for the upper levels of One Story Street 52 Brattle. For public record we have these concerns which we trust will be addressed by the proponent prior to construction: That the proponent and the city consult with CCAE in the final selection of materials used to construct the security gate and the location of security lighting which will have a direct impact on our

building at 5 Story Street, and the placement of ballads and/or curbs to prevent damage to same. That the space behind the rolling grill for the restaurant be organized to allow all room for dumpsters along with a grease barrel cabinet, gas meters and other items such as milk crates stored outside so that none of these items are inadvertently left in the narrow walkway between our buildings. And that the CCAE participate in determining the size and location of the new curb cut. That the City of Cambridge install a 'No Idling' sign that will be legible by vehicles using the service area which abuts our public infrastructure. And we also seek assurance that there will be no increase in this use of this ramp for deliveries, disposal of any other services to the building, and that the City of Cambridge Ordinance regarding trash removal, dumpster maintenance, oil/food storage be observed at

all times. Thank you for your attention, Susan Hartnett, Executive Director."

And so all those issues will be addressed?

MACGREGOR FREEMAN: Yes.

TAD HEUER: You're not making any change to the curb cut, right?

MACGREGOR FREEMAN: The curb cut we're trying to -- this is the original curb cut. This was actually -- this is actually from the 1800s. There was a -- I might as well show it. There was a stable on the corner. This is 5 Story Street here and this is 52. There was a stable here that was built in the 1860s, I believe. The house that was on the corner, you can't see it very well, but it was a mansard roof house, and it was torn down in 1947 to build a -- to build the first building that went on here. And that was torn down in '56 to build this building because this is larger and they were able to

do more.

This curb cut related to that stable, and it actually overlaps, you can see, off to the right of the entrance of this building. So that it's, it's I think -- I can't remember, it's 12 feet wide or something like that. We're going to raise that up because it's the only safe way to have the access for the wheelchairs at the doorway of the new addition. But we are proposing a curb cut, a new curb cut just for the alley, and that would be one that's four feet across at the base with corner granite, two foot radius curbs to delineate it from the sidewalk. It is not a handicapped accessible ramp. We're not intending it to be. The handicap accessible ramp is up at this corner, and that's the way we spoke to Larry in the Building Department. And people who come to this should be coming down this sidewalk and not trying to get up this little ramp here

because of the conflict with --

TAD HEUER: So are you going to close the curb cut on the right or are you going to just extend it to the left?

MACGREGOR FREEMAN: No. We're actually -- well, it actually overlaps over here. We will be raising this curbstone up.

TAD HEUER: So, you're closing the curb cut?

MACGREGOR FREEMAN: Yes. And we're going to make this one, as I tried to illustrate in this Photoshop stuff, tried to make this one more suitable for the width of the opening that's there.

We showed all this to the CCAE people. The specifics of how it works, it doesn't work very well here because the brick dips down so much. But the type that curves in with a chunk of granite, it terminates and your eyes sees the probably --

BRENDAN SULLIVAN: And you have a

mobility problem, too.

MACGREGOR FREEMAN: Yes. And we'll probably use the concrete cross slope piece there because your eye catches that as you're going along the sidewalk, too. What it does is keep it farther away. That's the reason we shifted the door location to the other side. So that there's much more room over there. It's not a -- it's six feet, one and a half inches sidewalk width, and the first 0.8 feet of that is owned by the landlord. So it's very narrow.

BRENDAN SULLIVAN: Let me make a motion to grant the relief requested for the constructed addition and an accessible entrance at the sidewalk level and entrance for an elevator to provide disabled access to the second and floor classrooms and offices.

The Board finds that a literal enforcement the provisions of the Ordinance would involve a substantial hardship to the

petitioner because it would preclude them from installing a much needed elevator and handicapped accessible entrance into the much used building.

The Board finds that the hardship is owing to the size of the building, and location of the building on the lot. That the building is a three-story structure which was constructed in 1958 almost to the lot lines, except on the side where the elevator addition is proposed. There is no other space available to provide an accessible elevator to service the second and third floors. And the proposed location would be able to provide a direct accessible route at the sidewalk grade and through the elevator lobby. It would otherwise be impossible without the relief being granted unless a stair lift was used, which would intrude on the sidewalk and violate the requirement -- required exit stair dimension

as required in accordance with 780 CMR of the State Building Code.

The Board finds that desirable relief may be granted without substantial detriment to the public good. In fact, that the addition would enhance the public good and accessibility to this building.

And that the relief may be granted without nullifying or substantially derogating from the intent and purpose of the Ordinance.

Relief is granted on the condition that the work comply with the drawings submitted and initialed by the Chair.

All those in favor of granting the Variance?

(Show of hands.)

BRENDAN SULLIVAN: Five in favor.

(Sullivan, Alexander, Hughes,

Heuer, Scott.)

(Whereupon, at 11:40 p.m., the
Board of Zoning Appeal
adjourned.)

C E R T I F I C A T E

**COMMONWEALTH OF MASSACHUSETTS
BRISTOL, SS.**

I, Catherine Lawson Zelinski, a
Certified Shorthand Reporter, the
undersigned Notary Public, certify that:

I am not related to any of the parties
in this matter by blood or marriage and that
I am in no way interested in the outcome of
this matter.

I further certify that the testimony
hereinbefore set forth is a true and accurate
transcription of my stenographic notes to the
best of my knowledge, skill and ability.

IN WITNESS WHEREOF, I have hereunto set
my hand this 20th day of June 2011.

Catherine L. Zelinski
Notary Public
Certified Shorthand Reporter
License No. 147703

My Commission Expires:
April 23, 2015

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